Supreme Court, U.S.
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No. 07- 07-650

IN THE

Supreme Court of the United States

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.,

Petitioners,

v.

DAVID JENKINS AND CINDY JENKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Entergy Louisiana, Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), a state court may determine that the bulk power supply arrangements of an interstate power pool governed by a FERC tariff violate state tort law and may award retail customers damages based on what their electricity rates would have been if the interstate power pool operated in the manner that the state court jury finds prudent?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those appearing in the caption to this petition.

Pursuant to Rule 29.6, Petitioners Entergy Services, Inc., Entergy Power, Inc., Entergy Power Marketing Corporation, Entergy Arkansas, Inc., and Entergy Gulf States, Inc. are each wholly-owned subsidiaries of petitioner Entergy Corporation. Petitioner Entergy Corporation has no parent corporation. No publicly traded company owns more than 10% of the stock of Entergy Corporation.

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DAVID JENKINS AND CINDY JENKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Entergy Corporation, Entergy Services, Inc., Entergy Power, Inc., Entergy Power Marketing Corporation, Entergy Arkansas, Inc., and Entergy Gulf States, Inc. respectfully request that a writ of certiorari issue to review the judgment of the Texas Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Appendix ("App.") 2a-36a, is reported at 187 S.W.3d 785 (Tex. App. 2006). The Order of the Texas

Supreme Court denying review of that decision, App. 1a, and the Order denying a petition for rehearing, App. 42a, are unreported. The decision of the District Court of Chambers County, Texas, 334th Judicial District, App. 37a-39a, is unreported.

JURISDICTION

The opinion and judgment of the Texas Court of Appeals was entered on March 2, 2006. Entergy's timely petition for review was denied by the Texas Supreme Court on February 2, 2007, and the Texas Supreme Court denied Entergy's timely petition for rehearing on August 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution and the Federal Power Act, 16 U.S.C. §§ 791a-828c, are reprinted at App. 45a-58a.

STATEMENT OF THE CASE

In this case, the Texas Court of Appeals held that state courts have jurisdiction to apply state tort law to review and second guess the bulk power supply arrangements of interstate electric systems that are governed by tariffs approved by the Federal Energy Regulatory Commission ("FERC"). In particular, the Texas court held that a jury may determine that the power purchase and supply decisions made by the operator of the multistate Entergy system violated various provisions of state tort law. It thus also held that a jury may award damages to the retail customers of the Entergy operating company that serves Texas—Entergy Gulf States Inc. ("EGSI")—

based on the difference between the power costs that this retail utility in fact incurred under the FERC tariff and those that it would have incurred if the Entergy System operator had acted in the manner that the jury finds to have been prudent.

This decision is squarely contrary to *Entergy Louisiana, Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003) ("*ELI*"), *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988) ("*MP&L*") and their many precursors. *ELI* and *MP&L* hold that FERC has exclusive jurisdiction to review wholesale power supply arrangements and cost allocations within interstate power pools, and that a complaint at FERC is the exclusive remedy for any persons who assert that the power pool has acted imprudently. *ELI*, 539 U.S. at 49-50; see *MP&L*, 487 U.S. at 374-75. Both decisions thus also hold that costs that are imposed under a FERC tariff must be included in retail rates and recovered from retail ratepayers, unless and until FERC determines the wholesale costs are unreasonable. Contrary to the Texas court's decision, *ELI* expressly holds that these preemption principles apply even if the FERC tariff delegates discretion to a system operator to make determinations that establish the wholesale rates and cost allocations. *ELI*, 539 U.S. at 49-50.

These principles also squarely bar state courts from exercising state tort law jurisdiction over any putatively discretionary decisions of the "wholesale" operator of an interstate power pool. Just as state utility commissions must include wholesale power costs incurred under FERC rate schedules in the retail rates, state courts cannot nullify FERC's jurisdiction by directly reviewing the power supply arrangements of the power pool, finding that they

resulted in "excessive" wholesale charges, and awarding the amount of the excessive wholesale charges to retail ratepayers as tort damages. Contrary to the Texas court's conclusion, a claim cannot fall outside the jurisdiction of a state utility commission on the ground that it concerns wholesale rates yet be within the jurisdiction of a state court to apply generally applicable tort or other state law. The grant of exclusive jurisdiction to FERC over wholesale transactions preempts *any* tribunal from applying any state standards to these arrangements. Indeed, lay jurors have far greater potential to base decisions on parochial interests and to disrupt the operation of interstate electrical systems than do state utility commissions.

The Texas court's decision squarely conflicts with two recent decisions of the Ninth Circuit that have held that wholesale rates and cost allocations under FERC tariffs cannot be challenged under generally applicable state laws. In addition, the Texas court's decision conflicts with the decisions of numerous state supreme courts and with decisions of the federal courts of appeals for the District of Columbia, First, and Fourth Circuits.

Review of the Texas court's decision, and resolution of these conflicts, is critical to the efficient operation of the nation's electrical system and to the protection of the Congressional scheme for regulation of the generation, transmission, and wholesale sale of electricity in interstate commerce.

1. The Multi-State Entergy System. This case arises in the same "integrated power pool" that was involved in *MP&L*, 487 U.S. at 357, and *ELI*, 539

U.S. at 48: the Entergy System (formerly known as the Middle South System).

The Entergy System provides electric service to over 2.6 million retail customers located in four different states. Petitioner Entergy Corporation is a holding company. It owns five Operating Companies: petitioner EGSI (which serves parts of Texas), Entergy New Orleans Inc., Entergy Louisiana Inc., Entergy Mississippi Inc., and petitioner Entergy Arkansas Inc. Entergy Corporation also owns petitioner Entergy Services, Inc. ("Entergy Services"), which performs centralized management, administrative, and other services for the Entergy System.[1]

Entergy Corporation, its five Operating Companies, and Entergy Services are all parties to the Entergy System Agreement ("ESA"), the relevant portions of which are reproduced at App. 59a-84a. This agreement provides for the integrated "planning, construction, and operation of the electrical generation, transmission and other facilities of the Companies," and it governs the allocation of costs of these facilities among the Operating Companies. App. 61a (ESA § 3.01). The System Agreement has been filed with FERC and is a FERC-approved tariff. See *ELI*, 539 U.S. at 42.

The System Agreement is administered by a System-wide Operating Committee comprised of representatives of Entergy and each of its Operating Companies. App. 71a (ESA § 5.01). Under the System Agreement, the System Operating Committee is

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[1] Petitioner Entergy Power, Inc. operates certain generating facilities, and petitioner Entergy Power Marketing Corporation sells electricity at wholesale to unaffiliated utilities.

charged with developing a "generation addition plan" to assure that the Operating Companies will have sufficient capacity to "furnish reliable service to customers at the lowest cost consistent with sound business practice." App. 64a (ESA § 4.01). Thus, in addition to determining when Operating Companies may construct new generating units, the System Operating Committee determines whether or when electric capacity or energy is purchased from outside sources. App. 64a-65a (ESA § 4.02). The System Agreement requires the System Operating Committee to coordinate purchases "from external sources as may be required or will result in savings to the Companies." App. 75a (ESA § 5.06(p)).

Under the System Agreement, each generating unit that is owned by or under contract to an Entergy Operating Company is available to meet the load of each of the Operating Companies. The System Operating Committee is responsible for the "dispatch" of the System's Capability: that is, scheduling the particular owned or contracted units that will be used to supply the System's load at each second, minute, or hour of each day. The System Agreement establishes an explicit standard to govern these dispatch decisions:

> The System Capability shall be operated as scheduled and/or controlled by the System Operator to obtain the lowest reasonable cost of energy to all the Companies consistent with the requirements of daily operating generation reserve, voltage control, electrical stability, loading of facilities and continuity of service to the customers of each Company.

App. 77a (ESA § 30.02). In addition, the System Agreement provides that, under the general direction

of the Operating Committee, Entergy Services will operate a centralized operations center that is equipped with such computers, other equipment, and staff that is necessary "to dispatch the capacity and energy capability of the Companies in the efficient, economical, and reliable manner as provided in this Agreement." App. 68a, 76a (ESA §§ 4.08, 6.02).

The System Agreement also allocates the costs of generating and transmitting electricity among the five Entergy Operating Companies. These allocations are achieved through a series of Service Schedules, which are used to calculate monthly inter-system payments that are made among the individual Operating Companies. The Service Schedule that was at issue in *ELI* was MSS-1, Reserve Allocation, which is designed to assure that each Company bears financial responsibility of its share of the System's generating capacity.

The Service Schedule that is directly at issue in this case is MSS-3, Exchanges of Energy Among the Companies. App. 9a. It allocates the fuel and other costs of operating the generating facilities that have been centrally dispatched to meet the System's load, regardless of whether the generating facilities are owned by an Entergy Operating Company or are a third party's facilities from which electricity has been purchased under contract. App. 77a-83a (ESA §§ 30.01-30.10). Under MSS-3, determinations are made hourly, on an after-the-fact basis, of whether each Operating Company is providing energy for use by the System (from facilities it owns or controls) that is in excess of that company's load. App. 80a-83a (ESA §§ 30.08, 30.09, & 30.10). If it is, the company is entitled to be paid for that excess energy under the rate formula set forth in ESA § 30.08. If it is not and is instead receiving energy in excess of its load, the

company is required to make payments under that same formula.

Under MSS-3 (and the other Service Schedules), Entergy Services makes monthly determinations of the obligations of each of the Operating Companies. It then renders an "inter-System" bill directing individual companies to make payments. Under the System Agreement, an Operating Company is required to pay the charges that are properly assessed by Entergy Services.

MSS-3 and the other service schedules in the System Agreement thus do not contain specific rates or cost allocations. Rather, they establish formulas that prescribe how the wholesale charges are to be calculated and allocated among the Operating Companies based on decisions made by the System Operating Committee under the standards of the System Agreement. FERC has specifically approved these "automatic adjustment clauses" under its authority under Section 205(c) of the Federal Power Act. *ELI*, 539 U.S. at 49-50. It has found that the Entergy service schedules are proper because they allow upward or downward adjustments of costs based on actual costs and conditions within an integrated electric system and because inclusion of "any questionable costs" could be remedied in a complaint proceeding under Section 306 of the Federal Power Act. *Middle South Servs. Inc.*, 30 FERC ¶ 63,030 at 65,131-32 (1985).

As respondents have here conceded, the payments that EGSI and other Energy Operating Companies make under MSS-3 (and the other service schedules) are wholesale power costs that are required to be treated as "reasonable operating expenses" by retail ratemaking bodies and included in the retail rates paid by retail consumers. See *ELI*, 539 U.S. at 47-48.

2. This Lawsuit. On September 20, 2004, Respondents filed a putative class action on behalf of all retail customers of EGSI in Texas state district court. This action was brought against all of the petitioners *except* EGSI (which was identified as an unnamed co-conspirator over which the Texas Public Utility Commission had exclusive jurisdiction).

In this action, respondents claimed that petitioners had engaged in a course of conduct which artificially inflated the wholesale power costs that were allocated to EGSI under the System Agreement and that were then passed on to retail ratepayers in the rates approved by the Texas Public Utility Commission. In particular, they alleged that the Entergy System had inflated EGSI's wholesale power costs by selling inexpensive system-generated power to third parties on the wholesale market, by refusing to purchase cheaper power that could have been purchased from market sources outside the Entergy System, and by dispatching higher-cost system-generated power to meet the needs of EGSI and other system Operating Companies. App. 4a. In these regards, respondents alleged that the computers used to make dispatch decisions had been improperly programmed to base decisions on fictitious costs, and not the actual costs of generating electricity. *Id.*

At the same time, respondents stated that they were not challenging the hour-by-hour and day-by-day dispatch decisions of the System Operator or contending that Entergy Services had improperly applied the MSS-3 formula to these dispatch decisions. Rather, respondents asserted that they were challenging discretionary "generate or purchase" decisions that the System Operating Committee had made prior to dispatching power.

Respondents contended that these discretionary actions were unlawful and actionable under various provisions of Texas tort law, both common law and statutory.[2] They claimed a right to recover damages calculated as the difference between the retail rates they actually paid, and the retail rates they would have paid if Entergy had behaved prudently and not engaged in the alleged manipulation of power supplies that inflated EGSI's wholesale costs.

After EGSI intervened in the action, all petitioners moved to dismiss the action for lack of jurisdiction.[3] They contended that plaintiffs were challenging bulk power supply arrangements of an interstate power pool that is governed by a FERC rate schedule and that FERC has exclusive jurisdiction over all such claims. In this regard, they asserted that, if respondents' allegations were true, the Entergy System would have violated the express requirements of the System Agreement that generating capacity be acquired and dispatched in order to produce reliable service at the lowest possible cost for the Entergy System as a whole. In support of these claims, petitioners submitted the Entergy System Agreement and an affidavit identifying the relevant provisions.

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[2] Respondents relied on the Texas common law of conspiracy, breach of fiduciary duty, constructive fraud, and disgorgement of wrongful profits and also on the Texas Theft Liability Act (Texas Civ. Prac. & Rem. Code, §§ 134.001 *et seq.*).

[3] Petitioners had removed the case to federal district court on the basis of federal question jurisdiction, but the federal district court remanded after concluding that respondents' state tort claims did not depend on proving a violation of a FERC tariff and that whether or not the Entergy System Agreement governs the conduct at issue, federal preemption could only be asserted as a defense to the action. App. 5a-6a; see *Pan Am. Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 664 (1961).

In addition, Entergy also sought dismissal on the ground that the relief that was sought—a refund to retail ratepayers of the amounts by which the wholesale charges to EGSI had allegedly been unlawfully inflated—violated the filed rate doctrine and was also within the exclusive jurisdiction of the Texas Public Utility Commission.

3. The Texas Courts' Decisions. The Texas District Court agreed with petitioners and granted the motion to dismiss for want of jurisdiction. It held that the challenged conduct was within the exclusive jurisdiction of FERC and that the relief respondents sought was within the exclusive jurisdiction of the Texas Commission. App. 37a-39a.

Respondents appealed to the Texas Court of Appeals, which reversed and remanded for further proceedings.

First, the Court of Appeals held that no aspect of this case is within the exclusive jurisdiction of the Texas Public Utility Commission. It reasoned that the challenged conduct involves wholesale power sales in interstate commerce that are matters over which state utility commissions cannot exercise jurisdiction, under *MP&L* and other such decisions. App. 19a-21a, 23a. It further stated that the application of state tort laws "is inherently judicial in nature." App. 23a.

Second, the Court of Appeals held that *MP&L*, *ELI*, and other such decisions do not preempt state courts from applying state tort law to these same wholesale power transactions. The Court concluded that state court tort jurisdiction will be preempted only when the plaintiff challenges a "cost allocation" that is "FERC-mandated" or that involves "discretionary

decisions that would impact or impair FERC's flexibility in approving cost-allocation arrangements." App. 30a. The Court determined that neither standard is met here. App. 31a-32a.

The Court noted that FERC does not assert exclusive jurisdiction over all issues arising under all power supply contracts, App. 28a, and relied on FERC's statement that the setting of reasonable wholesale rates normally will not require determinations whether a retail utility "has prudently chosen from among available supply options." App. 30a-31a (quoting *Central Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,975 (1998)). The Court further noted that the power generation, dispatch and cost allocations at issue "are not mandated by FERC, but instead are delegated to the operating committee, to which the participating companies must defer." App. 31a-32a. Relying on FERC's *Central Vermont* decision, it concluded that the "fact that the operating committee has such discretion granted in the System Agreement does not mandate that FERC oversee" the bulk power supply and dispatch decisions. App. 34a. It further concluded that the "discretionary decisions in issue" are "the type that do not impact or impair FERC's flexibility in approving cost-allocation arrangements" and purported to distinguish *ELI* on this ground. App. 32a.

In addition, the Court of Appeals rejected petitioners' claims under the filed rate doctrine. It stated that this doctrine is not violated because respondents stated that they were not challenging the rates set forth in the System Agreement and would use those rates in calculating damages. App. 32a-33a. Having rejected petitioners' federal

preemption defense, the Texas Court of Appeals remanded the case to the trial court for further proceedings.

Petitioners filed a petition for review with the Texas Supreme Court. After respondents filed a response, the Texas Supreme Court ordered the submission of full briefs by both parties. The Texas Supreme Court denied the petition for review on February 2, 2007. Petitioners then filed a petition for rehearing, which was supported, *inter alia,* by an *amicus curiae* brief of the Texas Public Utility Commission. After ordering a response, the Texas Supreme Court denied rehearing on August 17, 2007.

Thus, the Texas Court of Appeals is the "highest court of [the] State in which a decision could be had" and its decision is a "final judgment" on the question whether the Federal Power Act preempts the state court proceedings. 28 U.S.C. § 1257(a); see *MP&L*, 487 U.S. at 370 n.11 (although the state supreme court ordered further proceedings on remand, "[t]he critical federal question—whether federal law preempts such proceedings ... however, has already been answered by the State Supreme Court and its judgment is therefore ripe for review"); see also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-77 (1975); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54-56 (1989).

REASONS FOR GRANTING THE PETITION

This case presents a recurring question under the Federal Power Act that has immense national importance. Interstate power pooling arrangements are commonplace in the electric industry, and allocations of wholesale power supplies and their costs inherently affects the rates of citizens located in

multiple states and involves tens or hundreds of millions of dollars. Ratepayers in individual states and their representatives have incentives to pursue any remedies that would allow these allocations to be challenged in a forum that shares their parochial interests rather than before FERC—the neutral forum established by Congress to address these issues.

In this case, Texas courts established a broad and indeterminate exception to FERC's exclusive jurisdiction over wholesale electricity rates and cost allocations under the Federal Power Act. While recognizing that state utility commissions cannot seek to nullify these allocations, it held that juries may do so in tort actions when it is alleged that the allocations are the product of discretionary decisions of the operators of interstate power pools. Under this holding, class action state tort suits may do what this Court held to be preempted in *ELI, MP&L, Nantahala,* and their various precursors: relitigate FERC-approved rates and cost allocations and "trap" or otherwise prevent the recovery of wholesale costs that FERC tariffs allocated to retail ratepayers in particular states. The result would be a patchwork of parochial rulings that is the antithesis of what Congress intended in the Federal Power Act.

The Texas court decision is manifestly worthy of this Court's review. It conflicts with the decisions of this Court. It conflicts with decisions of other lower courts. And it raises issues that are critically important to a vital national industry and to the administration of the federal statute that governs it.

1. State regulation of the transmission and sale of electricity at wholesale in interstate commerce "can patently interfere with broader national interests." *Arkansas Elec. Co-op. Corp.* v. *Arkansas Pub. Serv.*

Comm'n, 461 U.S. 375, 377 (1983). It would allow the reasonableness of wholesale rates and of interstate cost allocations to be litigated in multiple states. Because each state would seek to "protect its respective local interests," it can lead to inconsistent determinations that impair commerce vital to the nation. *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927) (holding state regulation of wholesale power transactions violates the Commerce Clause); *accord Massachusetts Dep't of Pub. Utils.* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (each state would seek to "benefit[] its residents to the detriment of its neighbors").

In the Federal Power Act, Congress thus gave a neutral federal forum—FERC—exclusive jurisdiction over the "transmission" and "sale of [electric] energy at wholesale in interstate commerce." 16 U.S.C. § 824, App. 45a. Under Section 205 of the Act, each utility must file with FERC a rate schedule that contains the utility's rates for wholesale sales of electricity, and all contracts and arrangements affecting those rates, and FERC is required to assure that the schedules, and the resulting charges, are just, reasonable, and nondiscriminatory. 16 U.S.C. § 824d(a) & (c), App. 49a. The Act protects the interests of states, municipalities, and retail ratepayers by giving them the right to participate in FERC proceedings and to file complaints at FERC. 16 U.S.C. §§ 824d, 824e & 825e, App. 49a-58a. If FERC finds a wholesale rate or cost allocation to be excessive and makes other related determinations, it has the authority to order a refund, which can then be flowed through to retail ratepayers. 16 U.S.C. § 824e(c), App. 55a-56a.

As this Court has repeatedly held, FERC's jurisdiction is "exclusive" and "applies not only to rates but also to power allocations that affect wholesale rates." *MP&L*, 487 U.S. at 371; *accord*, *Nantahala Power & Light* v. *Thornburg*, 476 U.S. 953, 956 (1986). The Act gives FERC "plenary" jurisdiction to regulate all aspects of wholesale transactions, regardless of their "impact" on state regulation, and thus draws a "bright line easily ascertained" that divides federal and state authority. *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964); see also *MP&L*, 487 U.S. at 377 (Scalia J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over that subject."). State laws are preempted to the extent that their "effect" is to interfere with FERC's interstate "allocation of costs." *Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981).

The "filed rate doctrine" was developed to "enforce the exclusive jurisdiction vested by Congress in FERC," for this doctrine requires states to give effect to wholesale rates and power allocations contained in FERC tariffs unless and until they are disapproved by FERC. *Nantahala*, 476 U.S. at 966. This Court has thus held that state action that would have the effect of preventing the recovery of these rates is preempted, even if the state law challenge is based on grounds that have not been previously decided by FERC. *MP&L*, 487 U.S. at 375. "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission [FERC] or a court reviewing the Commission's Order." *Id.*

In *ELI*, the Court held that state commissions and tribunals are equally foreclosed from collaterally

attacking the wholesale charges that are imposed on retail utilities under automatic adjustment clauses that are administered by a system's operating committee and that depend on decisions committed to its "discretion." *ELI*, 539 U.S. at 49-50. Automatic adjustment clauses are authorized by the Federal Power Act, and MSS-1, MSS-3 and the other Service Schedules in the Entergy System agreement were approved by FERC. *ELI* held that, under the filed rate doctrine, "[i]t matters not whether FERC has spoken to the precise classification ... but only whether the FERC tariff dictates how and by whom that classification should be made." *Id.* at 50. *ELI* thus held that, unless and until disapproved by FERC, the charges that the Entergy System imposes on Entergy Operating Companies pursuant to Service Schedule MSS-1 must be treated as reasonable operating expenses by state tribunals and that they cannot seek to "trap" or otherwise prevent recovery of these costs. *ELI*, 539 U.S. at 49-51.

2. In this case, the Texas Court of Appeals violated these principles. It held that state courts may determine that the wholesale power costs that were assessed on Entergy's Texas affiliate (EGSI) under a different service schedule of the Entergy System Agreement (MSS-3) were excessive under state tort law. It similarly held that a state court may order the Entergy System to pay EGSI's retail ratepayers the full amount of whatever portion of these wholesale charges are found excessive by a jury. The Texas Court of Appeals concluded that this case fell within certain purported exceptions to the rules of *MP&L* and *ELI* and to FERC's exclusive jurisdiction.

First, the Court of Appeals concluded that, under *ELI*, Texas courts are not required to treat the charges that EGSI incurred under MSS-3 as

reasonable because these charges purportedly resulted from "discretionary decisions" that are the "type" that "do not impact or impair FERC's flexibility in approving cost-allocation arrangements." App. 32a. The Texas Court here has misconstrued *ELI*. It does not provide that state courts are to consider, on a case-by-case basis, whether state review of the operation of automatic adjustment clauses would "impact or impair FERC's flexibility." This Court has "long rejected this sort of 'case-by-case analysis of the impact of state regulation on the national interest.'" *MP&L*, 487 U.S. at 374, (quoting *Nantahala*, 476 U.S. at 966 (quoting *Southern California Edison*, 376 U.S. at 215-216)).

Thus, *ELI* rejected precisely the "exception to the filed rate doctrine" that the Texas court adopted. *ELI*, 539 U.S. at 49-50. *ELI* held that *all* charges imposed pursuant to congressionally authorized automatic adjustment clauses in tariffs should be treated the same as charges that are fixed by the tariff, for a different rule "would substantially limit FERC's flexibility in approving cost allocation arrangements." *ELI*, 539 U.S. at 49-50. Regardless of whether the tariff imposes charges that are fixed or adjustable, retail ratepayers and their representatives have a right to file a complaint at FERC if they believe that the wholesale rates and cost allocations are unreasonable, and FERC has exclusive jurisdiction to make this determination. *MP&L*, 487 U.S. at 375.

Second, the Court of Appeals concluded that the issues are outside FERC's exclusive jurisdiction because the operating company purportedly has "broad discretion" over bulk power supply arrangements under the System Agreement and that there is no "mandate that FERC oversee" these discretionary bulk power supply decisions. App. 34a.

But that is simply wrong. Respondents have raised issues involving the reasonableness of wholesale rates that are committed to FERC's exclusive jurisdiction, and the FERC tariffs at issue thus adopt standards to govern power supply and dispatch decisions within the Entergy System. FERC would be statutorily required to review respondents' claims if they filed a complaint at FERC under § 306 of the Federal Power Act, 16 U.S.C. § 825e. Indeed, when FERC approved MSS-3, it expressly stated that "any customer who believes that costs were imprudently incurred ... may file a complaint with the Commission," *Middle South Servs., Inc.*, 30 FERC at 65,131, and FERC has previously resolved complaints that challenged the design of MSS-3, the manner in which it was implemented by the Operating Committee, and specific cost allocations that have resulted from it.[4]

Respondents' allegations, too, are at the heart of FERC's exclusive jurisdiction. In particular, they allege that the Entergy System artificially inflated EGSI's power costs (and the Entergy System's profits) by selling the System's low-cost electricity to third parties, by failing to purchase cheap electricity that was available in wholesale markets, and by instead relying upon higher cost System-generated power to meet the needs of EGSI's Texas customers.

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[4] *Louisiana Pub. Serv. Comm'n* v. *Entergy Servs., Inc.*, 106 FERC ¶ 63,012, at 65,132 (2004) (rejecting claims of Louisiana Public Service Commission that MSS-3 imposed charges on Louisiana that are unjust, unreasonable, and discriminatory and that the System Operating Committee had violated the provisions of the System Agreement in its implementation of MSS-3), *aff'd in part, rev'd in part on other grounds by* 111 FERC ¶ 61,311 (2005).

If these allegations were proven, it would establish that the Entergy System was providing electricity to EGSI at wholesale rates that are "unjust, unreasonable, [and] unduly discriminatory" within the meaning of Section 206 of the Federal Power Act. 16 U.S.C. § 824e(a), App. 53a-54a. Thus, in other proceedings challenging the lawfulness of actual or proposed wholesale rates, FERC has routinely addressed allegations that a "prudent" utility would have lowered its costs by engaging in off-system power purchases (or sales),[5] and FERC would be required to review respondents' allegations if a complaint were filed challenging the reasonableness of the rates imposed on EGSI under MSS-3 on such grounds. Section 206 of the Federal Power Act imposes a duty on FERC to review all such claims. 16 U.S.C. § 824e, App. 53a-57a. Contrary to the Texas Court of Appeals suggestion, App. 28a, FERC has thus asserted "exclusive jurisdiction" over all matters

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[5] *See, e.g., Connecticut Light & Power Co.*, 43 FERC ¶ 63,029 at 65,228, 65,231 (1988) (deciding claims that prudent utility would have sold off entitlements to Millstone nuclear plant and instead obtained lower-cost power from Canadian utilities and cogeneration), *aff'd in part, rev'd in part on other grounds by* 48 FERC ¶ 61,139 (1989); *Arizona Pub. Serv. Co.*, 25 FERC ¶ 63,025 at 63,055-57 (1983), *aff'd*, 27 FERC ¶ 61,185 (1984) (deciding claims that a prudent utility should sell-off part of plant); see *AEP Generating Co.*, 36 FERC ¶ 61,226 at 61,549 (1986); *AEP Generating Co. and Kentucky Power Co.*, 38 FERC ¶ 61,243 (1987) (reviewing prudence of participating utility's decision to purchase output of system plant in light of the availability of alternate power sources); *Northern States Power Co.*, 17 FERC ¶ 61,196 (1981) (rejecting claim that it was imprudent to cancel the Tyrone nuclear plant and to obtain coal-fired power instead), *aff'd sub nom., South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982).

affecting wholesale rates and their reasonableness.[6] As *MP&L* holds, allegations that a utility system acted imprudently in choosing to acquire power from a particular source is a matter that is within FERC's exclusive jurisdiction, for they relate to whether the resulting wholesale rates and cost allocation are just and reasonable. *MP&L*, 487 U.S. at 375.

In addition, if respondents' allegations were true, it would also establish that the Entergy System had violated the provisions of the System Agreement that require electric capacity to be obtained and dispatched to achieve the "the lowest reasonable cost" for the System as a whole, consistent with the provision of safe and reliable service. See *supra* at 5-7 (discussing ESA §§ 3.01, 4.01, 4.02, 5.06, 30.02). Respondents allegations thus state claims that FERC is statutorily obligated to review for a second reason, and FERC has asserted exclusive jurisdiction over claims that violations of tariffs inflated wholesale charges incurred by retail utilities. See *supra* at 21 n. 6 (and cases cited).

The Texas court also erroneously relied on the ground that FERC has elsewhere stated that "wholesale ratemaking does not, *as a general matter*, determine whether a *purchaser* has prudently chosen from among available supply options." App. 31a, 34a, (emphasis added) (quoting *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,975 (1998)). As the Court of Appeals elsewhere states, the "prudence" of "EGSI's *purchasing* decisions" is not at issue in this case. App.

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[6] *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, at 61,021 (1995) (asserting exclusive jurisdiction over reasonableness of rates and claims of tariff violations affecting rates); *Northern States Power Co. v. Southern Minnesota Power Agency*, 55 FERC ¶ 61,101, at 61,343-44 (1991) (same); *Southern Co. Servs.*, 37 FERC ¶ 61, 256, at 61,652 (1986) (same).

18a (emphasis added). Rather, the allegation here is that the Entergy System manipulated energy purchasing and dispatch decisions and thereby inflated the wholesale rates that were charged under MSS-3 (and that EGSI was required to pay under the terms of the System Agreement). The reasonableness of the power supply choices of the Entergy System is a matter committed to FERC's exclusive jurisdiction, for these decisions determine the wholesale rates that are charged for electricity that is exchanged among the members of the Entergy power pool. Thus, regardless of whether the Entergy System has "discretion" in making these choices under the System Agreement, they affect wholesale rates and interstate cost allocations within the Entergy System and may only be reviewed by FERC.

In addition, even if respondents were challenging the prudence of EGSI's purchases, this Court has repeatedly held that FERC's reasoning in *Central Vermont* has no application to the Entergy System and other such power pooling arrangements. EGSI and its sister Operating Companies "exchange" power as part of an interstate power pool, and EGSI and the other System Operating Companies effectively act as both a "wholesaler-as-seller" and a "wholesaler-as-buyer." *MP&L*, 487 U.S. at 372. FERC exercises exclusive jurisdiction over claims that it was imprudent for members of power pools to receive electricity at particular wholesale rates as a "wholesaler-as-buyer." *Id.*; see *AEP Generating Co.*, 36 FERC ¶ 61,226 at 61,550-51 (1986); *MP&L*, 487 U.S. at 378 (Scalia, J., concurring).

This Court has thus held that the Federal Power Act preempts state law claims that a purchaser was imprudent where, as here, it is a member of an interstate power pool and the FERC rate schedule

mandated that it incur the wholesale power costs at issue. *MP&L*, 487 U.S. at 373-74; see *ELI*, 539 U.S. at 49-50; *Nantahala*, 476 U.S. at 972. The only situation in which a state can review the prudence of a buyer's power purchases is when the buyer could legally have chosen to obtain power from other sources at other rates, but EGSI and the other System Operating Companies have no such choice. See *MP&L*, 487 U.S. at 373-74.

The error of the Texas Court of Appeals is dramatically illustrated by the peculiar result it produces. The court held that the Texas state utility commission lacks jurisdiction over this case because it concerns wholesale rates that are committed to FERC's jurisdiction under federal law. But the lower court nonetheless held that state courts can review under state tort law principles the prudence of the system operator's generation, purchase and dispatching decisions and of the resulting wholesale rates that EGSI pays under the System Agreement (and that are passed through to retail ratepayers by the state utility commission). *Compare* App. 16a-21a (holding *MP&L* bars state commission jurisdiction over respondents' allegations), *with* App. 23a-36a (holding state tort claims are not preempted) & App. 23a (holding "state law tort claims based on [ ] interstate purchasing and allocation decisions" are "inherently judicial"). That result is contrary to the decisions of this Court and lower courts alike.

While *ELI*, *MP&L*, and *Nantahala* each rejected attempts by state commissions to use their authority over retail rates to subvert FERC's jurisdiction, the decisions rest on the broader proposition that FERC's jurisdiction over wholesale rates and cost allocations is exclusive. Other decisions of this Court have thus held that states are preempted from applying state

tort, contract, tax, or anti-fraud laws if the "effect" of the action would be to change FERC-regulated rates, *Arkansas Louisiana Gas. Co.* v. *Hall*, 453 U.S. 571 (1981), alter FERC's interstate "allocations of costs," *Maryland*, 451 U.S. at 749-50 (1981), or impose sanctions on conduct that federal agencies have jurisdiction to "to declare unlawful or unreasonable," *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324-27 (1981).

3. As the Ninth Circuit has recognized, the Federal Power Act thus equally preempts all such claims that are based on state laws of general applicability and are brought in state (or federal) courts of general jurisdiction. In particular, it has held that the Act preempts state law claims that wholesale costs incurred under FERC rate schedules were artificially inflated and that seek to recover the difference between those costs and the lower costs that would have been incurred if the utilities had complied with the purported state law standards. It has held that such allegations are within the exclusive jurisdiction of FERC, and plaintiffs exclusive remedy is to file a complaint at FERC. *Public Util. Dist. No. 1* v. *Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760-62 (9th Cir. 2004) (holding state antitrust and consumer protection law claims preempted), *cert. denied*, 545 U.S. 1149 (2005); *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831, 851-53 (9th Cir.) (holding state unfair business practice and fraud claims are preempted), *amended by* 387 F.3d 966 (9th Cir. 2004), *cert denied*, 544 U.S. 974 (2005). Contrary to the Texas Court of Appeals' suggestion, App. 25a-26a, these decisions establish that FERC has exclusive jurisdiction of all such claims, regardless of whether they partially rest on federal tariffs or are pled solely under state law standards.

The decision below also conflicts with the decisions of other federal courts of appeals and of numerous state supreme courts. At least five state supreme courts have held that FERC's jurisdiction preempts states from attempting to bar recovery of FERC-mandated costs on prudence or any other state law grounds.[7] The courts of appeals for the First, Fourth, Eighth, Ninth and District of Columbia Circuits, too, have each upheld FERC's exclusive jurisdiction over the reasonableness and lawfulness of bulk power supply arrangements and cost allocations within integrated, multi-state power systems governed by FERC rate schedules. See *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987); see also *Public Serv. Co.* v. *Patch*, 167 F.3d 15, 27 (1st Cir. 1998); *Transmission Agency* v. *Sierra Pac. Power Co.*, 295 F.3d 918, 930 (9th Cir. 2002); *Middle S.*

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[7] *See, e.g.*, *General Motors Corp.* v. *Illinois Commerce Comm'n*, 574 N.E.2d 650, 655-58 (Ill. 1991) (filed rate doctrine applies to costs associated with procurement of gas and state commission has no authority to conduct prudence review of such costs); *Maine Yankee Atomic Power Co.* v. *Maine Pub. Utils. Comm'n*, 581 A.2d 799, 803-04 (Me. 1990) (FERC has exclusive jurisdiction to determine utility's plant decommissioning expense and state commission could not assess the prudence of that expense); *Eastern Edison Co.* v. *Department of Pub. Utils.*, 446 N.E.2d 684, 688 (Mass. 1983) (FERC has exclusive jurisdiction to determine whether utility system was imprudent in failing to take greater steps to minimize risks in construction of plant); *Northern States Power Co.* v. *Minnesota Pub. Utils. Comm'n*, 344 N.W.2d 374, 381-82 & n.17 (Minn. 1984) (FERC has exclusive jurisdiction to assess the prudence of system's decision to cancel a nuclear plant and obtain coal-fired power instead); *Northern States Power Co.* v. *Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) ("it would undermine the supremacy clause and the preemption doctrine for the [state] to indirectly assert jurisdiction over the wholesale rates by investigating the reasonableness of underlying costs in a proceeding involving retail rates").

Energy, Inc. v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985); *South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982) (per curiam); *Anaheim, Cal.* v. *FERC*, 669 F.2d 799 (D.C. Cir. 1981).

The only circumstances in which either FERC or the lower courts have permitted states to bar recovery of costs under FERC rate schedules is where—as is not the case here—FERC regulation has *not* allocated costs to a particular *retail* utility and the retail utility had the legal right to obtain the power from one of many other sources. *Pike County Light & Power Co.* v. *Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983); see also *Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir. 1988); *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 703 (N.H. 1985); cf. *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). Petitioners are aware of no decision that has upheld the authority of state tribunals to review rates for the sale of electricity at wholesale.

Contrary to the decision below, both the Fourth Circuit and the Illinois Supreme Court have ruled that this *Pike County* exception to FERC's exclusive jurisdiction does not apply to the purchasing, generating and dispatching decisions at the wholesale level in an interstate power pool. *Appalachian Power*, 812 F.2d at 903-04 (rejecting application of *Pike County* exception to FERC's exclusive jurisdiction in case involving cost equalization provision of integrated power pooling agreement); *General Motors Corp.* v. *Illinois Commerce Comm'n*, 574 N.E.2d 650, 658 (Ill. 1991) (rejecting application of *Pike County* exception to FERC's exclusive jurisdiction in context of proposed

state prudence review of natural gas cost allocations imposed on retailers by FERC approved order). Such state regulation was held to violate the Commerce Clause before the Federal Power Act was passed, *Attleboro Steam & Elec. Co.*, 273 U.S. at 89-90, and clearly violates the "bright line" that divides state and federal authority under the Federal Power Act. *Southern California Edison*, 376 U.S. at 215-16.

4. Resolution of the conflicts described above is a matter of great national importance. Under its authority to regulate the wholesale sale and transmission of electricity in interstate commerce to foster the public interest, FERC has approved an array of different mechanisms that are designed to assure that electricity is provided at wholesale rates that are just, reasonable, and not unduly discriminatory. Each of these FERC-approved arrangements would be nullified if retail customers or their representatives could recover alleged overcharges as tort damages by bringing state-law actions claiming that the resulting wholesale rates or cost allocations are excessive due to arrangements FERC has chosen to leave to "discretionary" or other decisions of wholesale utilities.

Foremost, in the Federal Power Act, Congress directed FERC to "promote and encourage" "voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" in the interest of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy." 16 U.S.C. § 824a(a). The Act has led to widespread use of different types of interstate power pooling arrangement in which different retail utilities and other suppliers interconnect to ensure a reliable, economic supply of power and also agree on

mechanisms to distribute costs. It is commonplace for these pooling arrangements to commit generating and dispatch decisions to the operator of the pool, and as this Court has held, the Federal Power Act gives FERC the flexibility to approve these arrangements. *ELI*, 539 U.S. at 50.

Power pooling arrangments serves Congress' purpose in enacting the Federal Power Act. As one commenter has explained:

> It is universally accepted that interconnection and coordination of the facilities of separate electric companies is in the public interest. Among the most obvious benefits of such coordination are (1) the exploitation of economies of scale in building generating and transmission facilities; (2) the avoidance of unnecessary duplication of facilities; (3) the ability to place generating facilities at the most advantageous sites, regardless of ownership; (4) increased reliability because of the availability of emergency support from interconnected systems; and (5) operating economies which can be achieved by dispatching the lowest cost generation, regardless of ownership, to serve demands on the interconnected and coordinated systems.

K. Duffy, *Will the Supreme Court Lose Patience With Prudence?* 9 Energy L.J. 83, 98-99 (1988).

But the utility of all kinds of power pooling arrangements will be severely impaired if state courts and juries can review power supply and dispatch decisions and require power pools or their operators to refund any wholesale charges that are found "excessive" to retail ratepayers in a particular state. The entire purpose of power pooling

arrangements is to enable decisions to be made to maximize benefits for the pool as a whole, and "[a] pooling arrangement simply will not work if each participant continually seeks to maximize its own benefits or minimize its own costs at the expense of the other participants." *Id.* at 99.

For that same reason, a class of retail ratepayers in a state can always claim that an interstate power pool could have taken steps to reduce the costs that were allocated to that state by, for example, purchasing lower-cost power from outside its system. Prior to the decisions in *Nantahala* and *MP&L*, similar claims were routinely brought in local fora by retail ratepayers and their representatives. Suits like the one brought by respondents will be encouraged unless the Texas court decision is reviewed and this Court holds that, under *ELI, MP&L, Nantahala*, and their various precursors, such claims may only be brought in the neutral federal forum established by Congress: FERC.

Further, while power pooling arrangements are common in the electric industry, FERC has also established alternative "market-based" mechanisms for providing electricity at wholesale. It has granted wholesale utilities authority to sell electricity through auctions subject to particular FERC regulations and market-based tariffs that have been found by FERC to be sufficient to assure that the resulting rates are reasonable. See, *e.g.*, *Grand Council of Cress* v. *FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000). The two recent Ninth Circuit decisions, see *supra* at 24-25, held that state law challenges to these rates are preempted. But under the rationale of the Texas Court of Appeals, the lawfulness of these wholesale rates, too, can be challenged in state tort actions because FERC regulations do not prescribe every

detail of an auction. Indeed, since the issuance of this decision, state law class actions have elsewhere been brought in which retail ratepayers claim that rates set forth in FERC market-based tariffs are excessive and seek to collect the amount of the alleged overcharges as tort damages. See, *e.g.*, *Wexler* v. *Commonwealth Edison Co., et al.*, No. 1:07-CV-02318 (N.D. Ill.).

In short, the decision of the Texas courts threatens widespread interference with the operation of the nation's electrical system and with the Congressional scheme for assuring the provision of electricity at wholesale rates that are reasonable. Under the Federal Power Act, it is critical that determinations of the reasonableness of wholesale electric rates and cost allocations continue to be the exclusive province of the neutral forum that Congress established for this purpose, FERC, whose flexibility to authorize various mechanisms that economically and reliably ensure the provision of power can only be preserved by its exclusive jurisdiction over wholesale rates and cost allocations. "Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the [Federal Power Act.]" *Appalachian Power Co.*, 812 F.2d at 905.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF TEXAS
Austin, Texas

Case No. 06-0409
COA #: 13-05-00035-CV

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.,

v.

DAVID JENKINS AND CINDY JENKINS, individually and on behalf of all persons similarly situated.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX B

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI - EDINBURG

NUMBER 13-05-035-CV

DAVID JENKINS AND CINDY JENKINS, individually and on behalf of all persons similarly situated,
Appellants,

v.

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER INC., AND ENTERGY POWER MARKETING CORPORATION,
Appellees.

On appeal from the 344th District Court of Chambers County, Texas.

OPINION

Before Justices Hinojosa, Yañez, and Castillo

Opinion by Justice Castillo

This appeal is brought from the trial court's decision not to strike an intervention, and from the order of the trial court dismissing the underlying suit for lack of subject matter jurisdiction. In separate conclusions of law, the trial court found that both the Federal Energy Regulatory Commission ("FERC") and the Texas Public Utilities Commission ("PUC") have exclusive jurisdiction. We affirm in part, reverse in part, and remand.

I. Background

On August 5, 2003, appellants, David and Cindy Jenkins, individually and on behalf of all persons similarly situated ("Jenkins"), filed a petition alleging that appellees, Entergy Corporation, Entergy Services, Inc., Entergy Power, Inc., Entergy Power Marketing Corporation, Arkansas Electric Cooperative Corporation,[1] and Entergy Arkansas, Inc. (collectively "Entergy"), had devised an improper price-gouging scheme to sell and deliver higher-priced electrical power to Jenkins, while rejecting and/or selling less expensive power to off-system utilities.

In the petition, Jenkins identifies Entergy Gulf States, Inc. ("EGSI")[2] as an "unnamed co-conspirator," but asserts that it is not an indispensable party: "It [EGSI] is expressly not named as a party defendant, since primary jurisdiction over EGSI lay [sic] with the Public Utilities Commission of Texas."

Entergy Corporation is a public utilities holding company with five subsidiary companies, each of which is a public utility. The Entergy companies include electric power generation, transmission and distribution systems. The five subsidiaries operate in different states throughout the southern United States, providing electrical service to approximately 2.6 million retail customers. EGSI is the operating company serving approximately one million Texas consumers. Each operating company has electric generation facilities, consisting of either nuclear, coal, natural gas, or oil-fired generating plants. Power is

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[1] Arkansas Electric Cooperative Corporation was non-suited on March 26, 2004.

[2] David and Cindy Jenkins are Texas residents who receive their power through Entergy Gulf States, Inc. ("EGSI").

shared and distributed under a System Agreement, to which all Entergy companies are parties. The companies also purchase and sell power from each other and from non-affiliates in the wholesale power market. Although each company operates its generation, transmission and distribution facilities independently, the production, purchasing, and sale of wholesale electricity on behalf of those companies in order to meet needs of retail and wholesale customers are controlled centrally by Entergy Services, Inc. ("ESI"). These decisions are made through a dispatch center located in The Woodlands, Texas. ESI performs a monthly accounting, assigning a portion of the total power resources used by the whole system to each operating company, generating an "intra-system bill."

Jenkins alleges that Entergy and EGSI worked in concert to force excessive purchases of power by EGSI from within the Entergy system, rather than using cheaper power generated by non-Entergy companies, with the result that excessive prices were charged to EGSI customers. Jenkins complains that low-cost power is sold in the wholesale market for a profit, while high-cost power produced by the most inefficient systems is billed to Entergy's and EGSI's Texas customers. Jenkins further alleges that the accounting system was manipulated in an improper and illegal manner, resulting in excessive charges to retail customers between 1994 and 2000 that exceeded prevailing market prices. Jenkins contends that Entergy, through this pattern of theft and conversion, realized substantial illicit profits. Claims include breach of duty and breach of fiduciary duty, aiding and abetting, conspiracy, and violations of the

Texas Theft Liability Act.[3] Jenkins seeks damages, including a disgorgement of profits and exemplary damages.

In its original answer, Entergy alleged that Jenkins' claims were preempted by federal law. On September 15, 2003, Entergy removed the matter to federal court, urging federal question jurisdiction. Entergy urged that the terms and conditions of the sharing and allocation of power between the various operating companies were controlled by a tariff, approved by and on file with the Federal Energy Regulatory Commission ("FERC"). Although Jenkins' claims were couched in terms of state torts, Entergy urged that in reality all involved alleged violations of federal law and questions of the reasonableness of the tariff under federal law.

On January 29, 2004, the federal court remanded the matter to the state trial court. The order notes that Jenkins had opted not to plead federal claims and invoked no federal law in his complaint. Therefore, in order to fall within federal question jurisdiction, Entergy, who bore the burden on removal, had to satisfy a three-part test.[4] The federal court concluded that "this case provides no basis for federal jurisdiction since no federal right is an essential element of Plaintiffs' state-law claims." While FERC

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[3] TEX. CIV. PRAC. & REM.CODE ANN. § 134.001, *et seq.* (Vernon 2005).

[4] *See Howery v. Allstate Ins. Co.*, 243 F.3d 912 (5th Cir. 2001). *Howery* holds that federal question jurisdiction can exist where the complaint states a cause of action created by state law and (1) a federal right is an essential element of the state claim, (2) interpretation of the federal right is necessary to resolve the case, and (3) the question of federal law is substantial. *Id.* at 917.

regulates the wholesale of electricity in interstate commerce, none of Jenkins' claims were dependent upon the violation of a federal tariff. Jenkins could conceivably prove his claims by providing evidence of fraudulent accounting techniques used to overcharge customers. The federal tariff is "not an essential element to any of Plaintiffs' claims," and it "is well settled law that a case cannot be removed on the basis of a federal defense." The federal court determined that, whether or not the Entergy System Agreement governs the behavior of the parties, it provided no basis for removal jurisdiction. The federal court concluded it had no subject matter jurisdiction in the case.

On April 23, 2004, EGSI filed a petition in intervention, asserting that all of Jenkins' allegations involved prices paid by EGSI to other Entergy defendants and prices paid by EGSI customers for retail electricity. Further, all of the proposed class consisted solely of EGSI customers. EGSI urged that it therefore had a justiciable interest in the suit. That same day, the Entergy defendants (now including EGSI) filed a motion to dismiss for want of jurisdiction, urging that jurisdiction of the trial court was preempted by FERC, and by the Texas Public Utilities Commission ("PUC"), which governs retail rates for power sold to Texas consumers. Entergy pointed out that Jenkins had acknowledged that (1) EGSI's purchases from the Entergy system were based upon FERC "approved rate formulas and tariffs," and (2) EGSI's retail rates and services are subject to the jurisdiction of the PUC.

Jenkins moved to strike the intervention of EGSI, arguing that EGSI was an "interloper," seeking neither to secure affirmative relief nor to defeat any

attempt to recover from it. Jenkins urged that EGSI had no justiciable interest in the suit and that, as a joint-tortfeasor, it had no right to intervene for the purpose of defeating a recovery against a named defendant. Following a hearing held June 1, 2004, the trial court issued an order on June 15, 2004, denying the motion to strike the intervention.

Jenkins also opposed Entergy's motion to dismiss, urging that FERC law and regulations did not preempt the state court's jurisdiction. Extensive briefing was provided by both parties; on October 5, 2004, a hearing was held on the motion to dismiss for want of jurisdiction. On November 24, 2004, the trial court entered a "Final Judgment of Dismissal," finding that it lacked subject-matter jurisdiction to proceed. Findings of fact and conclusions of law were entered on December 17, 2004. They reflect the court considered the briefing and argument of the parties, as well as submitted affidavits.[5] The trial court determined there were no contested issues of fact for the court to find. Conclusions of law include the following: (1) Jenkins' causes of action all addressed matters governed by the System Agreement, a tariff filed with and accepted by FERC; (2) asserted damages are the difference between the price paid by Jenkins for electric service from EGSI and the price Jenkins would have paid if available lower-priced power had been allocated to EGSI; (3) under the Federal Power Act, FERC possesses exclusive jurisdiction over federal electric tariffs and court proceedings complaining of actions taken and decisions made under approved federal tariffs are preempted; (4) the amount paid by Jenkins and other retail customers of EGSI

[5] Objections to the affidavits were sustained to the extent that legal conclusions were not considered.

for electrical service in Texas is within the exclusive jurisdiction of the Texas PUC; and (5) because the acts and decisions complained of fall within the exclusive jurisdiction of FERC and the relief sought lies within the exclusive jurisdiction of the PUC, the trial court lacks subject matter jurisdiction over the matter.

II. The Agreement and the Transactions in Issue

The System Agreement is a federal tariff, approved and regulated by FERC. It applies an approved rate structure to regulate wholesale prices for electric power.[6] The System Agreement networks a system of companies by which the following is accomplished: (1) power generated by each participating company may be exchanged among system participants or sold to outside systems; (2) power may be purchased from off-system entities; and (3) a system operations center is created to (a) determine the most effective scheduling of sources for reliable supply of power and energy on an economical basis, (b) determine availability of energy for purchase from or sale to outside systems, (c) supervise and operate an economic system dispatch center, and (d) determine billing information and conduct accounting functions.[7]

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[6] The System Agreement calls for centralized control of electricity purchases, operations, and dispatches throughout the Entergy system, with the overall objective of "economic dispatch," defined to mean obtaining "the lowest reasonable cost of energy to all of the Companies consistent with the requirements of daily operating generation reserve, voltage control, electrical stability, loading of facilities and continuity of service to the customers of each Company."

[7] This listing does not encompass all functions of the System Agreement.

The decisions associated with these aspects of the System Agreement are at the heart of Jenkins' suit. Jenkins does not directly challenge either the rate structure or the FERC-approved formulas that permit recovery of costs by the operating companies participating in the System Agreement. Instead, Jenkins states that he challenges the purchasing decisions by which the costs were incurred in the first place, complaining about allegedly excessive purchases of power from the expensive resources of the Entergy-system pool, rather than from cheaper off-system sources when that power is available.

> ESI and/or EPMC dispatches the generating units of the Operating Companies and purchases power from non-affiliates in the wholesale power market in order to meet the energy needs of Defendants' and EGSI's customers . . . . ESI and/or EPMC has also sold to off-system buyers . . . [manipulating] the processes by which it decides whether to dispatch the System's generating units or purchase power off-system.[8]

Jenkins challenges these decisions because they allegedly resulted in the use of the more expensive power to service EGSI customers, thereby burdening them with higher costs for electrical service.

The System Agreement includes a Schedule MSS-3, which addresses the exchange of electric energy among the companies. Its purpose is to "provide the method of pricing energy exchanged among the Companies." It provides that "energy from the lowest cost source available shall be allocated pursuant to certain priorities;" "energy used to supply others will be provided in accord with rate schedules on file with

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[8] *See* Plaintiffs' First Amended Original Petition.

[FERC]." Energy produced by generating units for system energy requirements are allocated in an explicit priority sequence. Energy received by any company from either its own generation or from some other source can be pooled, distributed from a joint account, and allocated by the central dispatch center to one or more participating companies or to the company generating the power or making the purchase. The System Agreement provides for many of these decisions to be made at the discretion of the operating committee. However, payments for energy supplied and allocated are determined according to express formulas.

III. Issues on Appeal

Jenkins raises four issues on appeal to determine whether (1) the PUC has exclusive or primary jurisdiction over the matter, (2) FERC has exclusive, preemptive jurisdiction over the matter, (3) the trial court erred in dismissing the matter for lack of subject matter jurisdiction, and (4) the trial court erred in failing to strike the intervention of EGSI. The issues, as framed, directly challenge each of the conclusions of law of the trial court.

IV. Standard of Review

Jenkins' first three issues challenge the trial court's conclusions that it lacked subject matter jurisdiction over the suit. Primary jurisdiction questions are questions of law. *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (citing *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 19 (Tex. 2000)). Determining if an agency has exclusive jurisdiction requires statutory construction and raises jurisdictional issues. *In re Entergy Corp.*, 142 S.W.2d 316, 321 (Tex. 2004); *Subaru*, 84 S.W.3d at

222. Thus, whether an agency has exclusive jurisdiction is a question of law we review de novo. *Subaru*, 84 S.W.3d at 222 (citing *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 1999); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)).

The plaintiff bears the burden of alleging facts affirmatively demonstrating the trial court's jurisdiction to hear a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Mission Consol. Indep. Sch. Dist. v. Flores*, 39 S.W.3d 674, 676 (Tex. App. B Corpus Christi 2001, no pet.). A trial court must not weigh the merits of the case, but instead consider only the pleadings and evidence pertinent to the jurisdictional question. *County of Cameron v. Brown*, 80 S.W.3d 549, 554-55 (Tex. 2002) (citing *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001)). In doing so, the trial court must construe the plaintiff's pleadings liberally in favor of jurisdiction, *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 804 (Tex. 1989), and must take all factual allegations pled as true, unless the defendant pleads and proves that the allegations were fraudulently made in order to confer jurisdiction. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996). On appeal, we similarly consider the facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties. *White*, 46 S.W.3d at 868. We must construe the pleadings in the plaintiff's favor and look to the pleader's intent. *Brown*, 80 S.W.3d at 545-55. Our task is not to determine the merits of the case but rather to examine the petition, taking as true the facts pled, and determine whether those facts support jurisdiction in the trial court. *Baston v. City of Port*

Isabel, 49 S.W.3d 425, 427-28 (Tex. App. B Corpus Christi 2001, pet. denied).

With respect to Jenkins' fourth issue, we review a trial court's determination as to whether an intervention should be stricken for abuse of discretion. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996); *Guar. Fed. Savs. Bank. v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). The exercise of discretion is within the sole province of the trial court, and an appellate court may not substitute its discretion for that of the trial judge. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding). Rather, an abuse of discretion occurs only when the trial court reaches a decision that is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* at 917.

V. Analysis

A. The Role of EGSI in the Suit

Jenkins contends that EGSI was deliberately not named as a defendant in the underlying suit because primary jurisdiction over EGSI lies with the PUC. Jenkins further contends that the prudence of EGSI's actions was not before the court, as the claims were articulated in Jenkins' pleadings. Instead, Jenkins characterizes EGSI as an "interloper," who intervened solely to complicate the jurisdictional issues in the case.

However, this argument is problematic. Although the Entergy company ESI centrally controls allo-

cation and discretionary decisions, operates the dispatch center in The Woodlands, Texas, and prepares the monthly accountings, it is not the sole object of Jenkins' petition. Jenkins' pleadings in fact include accusations that Entergy (including ESI) and EGSI acted in concert, in a conspiracy:

> ESI, under the direction of or with the knowledge and/or consent of the other Defendants and EGSI, has manipulated the processes by which it decides whether to dispatch the System's generating units or purchase power off-system. . . . Defendants and EGSI, directly and/or indirectly, have actively participated with the other Defendants and EGSI in one or more improper and illegal schemes . . . . Defendants' and EGSI's after-the-fact accounting methods and computer programs have hidden and encouraged the improper purchasing decisions . . . . Defendants and EGSI have worked in concert in implementing the methods . . . Defendants and EGSI, directly and/or indirectly, charged customers 22% more than the prevailing market prices . . . [generating] vast and illegal revenues for Defendants' and EGSI's Entergy affiliates . . . .[9]

Defendants and EGSI are alleged to have jointly charged Jenkins for power secured at a higher cost than was obtainable on wholesale markets, intentionally or negligently failed to procure readily available supplies of electric power from non-affiliates, and converted profits realized for Entergy's and EGSI's use and benefit. EGSI is directly alleged to have participated in the same wrongdoing as the other named defendants; it is simply not named in the suit.

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[9] *See* Plaintiffs' First Amended Original Petition.

We conclude, from reading Jenkins' petition, that Jenkins' petition complains of wrongdoing by both Entergy and EGSI. Rather than being peripheral, EGSI is alleged to have been a full partner, co-conspirator, and co-tortfeasor in what is termed the illegal scheme. We therefore conclude that the prudence of EGSI's actions was in fact directly before the trial court by virtue of Jenkins' pleadings.

B. The Intervention

EGSI, not named as a party defendant, chose to intervene in the suit pursuant to rule 60 of the rules of civil procedure. TEX. R. CIV. P. 60. A person or entity has the right to intervene if it could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him he would be able to defeat recovery, or some part thereof. *Guar. Fed. Savs. Bank*, 793 S.W.2d at 657. No permission is required to intervene; the party opposing the intervention has the burden to challenge it by a motion to strike. *Id.* While the trial court has broad discretion to determine whether the intervention should be stricken, it is an abuse of discretion to strike a plea in intervention if (1) the intervenor meets the above test, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest. *Id.*

A party seeking to intervene must show a legal or equitable interest such that he would be entitled to recover in his own name to the extent of relief sought, or, if he were the original defendant, he would be able to defeat recovery in part or in whole. *Rogers v. Searle*, 533 S.W.2d 440, 442 (Tex. Civ. App. B Corpus Christi 1976, no writ). While that interest must be greater than a mere contingent or remote interest, a

party "has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation." *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App. B Houston [14th Dist.] 2004, no pet.); *Intermarque Auto. Prods., Inc. v. Feldman*, 31 S.W.3d 544, 549 (Tex. App. C Texarkana 2000, no pet.). Even where an intervenor has not or could not have been sued directly, if a judgment for the plaintiff may lead to an action against the intervenor or otherwise seriously prejudice the intervenor, the intervention is necessary to assure a proper defense against the claim. *Evan's World Travel, Inc. v. Adams*, 978 S.W.2d 225, 234 (Tex. App. B Texarkana 1998, no pet.). The party "must have such interest in the subject matter of litigation as makes it necessary or proper for him to come in to the case for the preservation of that right." *Id.*

Jenkins contends that, as an alleged joint tortfeasor, EGSI had no right to intervene. However, one of Jenkins' claims alleged that EGSI was an integral part of a conspiracy scheme, actively conceiving or condoning wrongful practices and directly participating in and profiting from the alleged wrongs perpetrated on customers of EGSI. While many parties are named as defendants, the fact that EGSI is alleged to have participated in a conspiracy and to have converted ill-gotten monies for its own direct use and benefit means that EGSI could potentially defeat recovery under that claim, in whole or in part.[10] We conclude that EGSI, an unnamed defen-

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[10] Elements of a conspiracy claim include (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result. *Chon Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005) (citing *Juhl v.*

dant, had a justiciable interest in the suit. We further conclude that the nature of the alleged wrongdoing by all named defendants is inextricably interwoven with the alleged wrongdoing of EGSI, deriving from the same allegations, and that EGSI's participation in the suit will not unduly complicate the case by a multiplication of issues. Finally, EGSI's intervention is essential to effectively protect some right or interest of EGSI. *See Guar. Fed. Savs. Bank*, 793 S.W.2d at 657. EGSI's interests are potentially adversely affected by the litigation in the event of a judgment for Jenkins. *Jabri*, 145 S.W.3d at 672; *Intermarque*, 31 S.W.3d at 549; *Evans World Travel*, 978 S.W.2d at 235. It is undisputed that the Entergy family of companies, including EGSI, makes purchasing, sales, and allocation decisions centrally for the set of companies as a whole. Any ruling in favor of Jenkins therefore will indirectly, if not directly, impact interests and operations of EGSI; this is further particularly true because the members of the putative class are all direct retail customers of EGSI.

We conclude that the trial court did not abuse its discretion in refusing to strike the intervention of EGSI. We overrule Jenkins' fourth issue on appeal.

C. The Role of the PUC and the Statutory Scheme

The PUC is charged with protecting the public interest in the rates and services of electric utilities,

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Airington, 936 S.W.2d 640, 644 (Tex. 1996)). If other defendants are able to prove they did not participate in a conspiracy, and EGSI is similarly able to defeat any claim that it participated, no claim for conspiracy can survive. Further, failure to include EGSI could potentially adversely impact EGSI by making it impossible for its parent or affiliate to defeat such a conspiracy claim, resulting in an indirect, if not direct, impact upon EGSI's operations and revenues.

to establish a comprehensive and adequate regulatory system for those utilities to assure just and reasonable "rates, operations, and services." TEX. CONST. art. V, § 8; TEX. UTIL. CODE ANN. §§31.001, 32.001 (Vernon 1998). The PUC's jurisdiction is admittedly broad, extending to issues involving the rates, operations, and services of an electric utility.

> [T]he statutory description of PURA[11] as "comprehensive" demonstrates the Legislature's belief that PURA would comprehend all or virtually all pertinent considerations involving electric utilities operating in Texas. That is, PURA is intended to serve as a "pervasive regulatory scheme" of the kind contemplated in *David McDavid Nissan*.[12]
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> * * *
>
> The Legislature's language demonstrates that it intended PURA to be the exclusive means of regulating electric utilities in Texas. The Legislature's description of PURA as "comprehensive," coupled with the fact that PURA regulates even the particulars of a utility's operations and accounting, demonstrates the statute's pervasiveness.

In re Entergy Corp., 142 S.W.3d 316, 322-23 (Tex. 2004) (citations omitted).[13]

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[11] Public Utility Regulatory Act, TEX. UTIL CODE ANN. §11.001 *et seq.* (Vernon 1998).

[12] *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002).

[13] *In re Entergy* involved an alleged breach of a merger agreement. That court determined that even if the merger agreement began as a private contract, it took on an administrative char-

The PUC may allow for recovery of the reasonable costs of purchased power. *See* TEX. UTIL CODE ANN. §§36.203 (Vernon 1998), 36.204 (Vernon Supp. 2005), 36.205 (Vernon 1998). In establishing and regulating retail rates, the PUC is not precluded from reviewing and providing adjustments for a utility's "fuel factor." *See* 16 TEX. ADMIN. CODE §§25.236-237 (Tex. 2005). These provisions govern the amount of dollars in expenses that a utility may recover from its retail customers.

D. The Question of Exclusive Jurisdiction of the PUC

The parties do not dispute that the commission has exclusive jurisdiction over rate structures, including fuel factors. Jenkins contends that he does not challenge any rate structure for electrical power or any other orders of the PUC, and that the reasonableness of the fuel and purchase power costs are not in issue. Jenkins instead challenges decisions to either purchase, use or sell lower-priced and higher-priced energy, not the monies or rates involved in those purchases. Jenkins argues that he challenges decisions relating to wholesale transactions, made at interstate levels that are beyond the jurisdiction of the PUC. Jenkins further contends that, while the PUC retains authority to review and evaluate EGSI's purchasing decisions, EGSI was not named as a defendant and the prudence of its actions was not before the trial court in Jenkins' pleadings.

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acter when the parties agreed that the merger savings would be implemented in the post-merger rate proceedings filed with the PUC, and the agreement was the basis for the PUC's regulatory approval of the merger. Therefore the PUC had exclusive jurisdiction over the dispute. *See In re Entergy Corp.*, 142 S.W.3d 316, 322-23 (Tex. 2004). That dispute is admittedly distinguishable from the situation before us.

We have already determined that EGSI could properly intervene in the suit and that the prudence of its actions were before the trial court. We further note that all putative class members are retail customers of EGSI.

1. Wholesale Rates and Interstate Commerce

Jenkins contends the challenged decisions lie beyond the jurisdiction of the PUC, involving matters of interstate commerce. The Entergy system cuts across several state lines, and involves transactions between multiple jurisdictions, in interstate commerce:

> [The Entergy Operating Companies] approach power planning on a systemwide basis, whereby the individual companies' needs are the component parts of the system's power plan [and] implementation of the System plan . . . require[s] that the individual companies' needs be subsumed by the greater interests of the entire System.

Miss. Power & Light Co. v. Miss., 487 U.S. 354, 376 (1988).

A state utility regulatory commission has the jurisdiction to regulate all in-state sales of the utility to consumers. *See Ark. Elec. Coop. Corp. v. Ark. Pub Serv. Comm'n*, 461 U.S. 375, 394-95 (1983) (holding states have an interest in regulating retail sales). However, the line under the Federal Power Act is clear, cutting "sharply and cleanly between sales for resale and direct sales for consumptive uses." *Id.* at 380 (concluding that a utility receiving some of its power from out-of-state is subject to federal and not state regulation in its sales of electricity to a municipality that resold the bulk of the power to

others).[14] Clearly, wholesale rates are subject exclusively to federal regulation. *Id.* at 380. "FERC has exclusive authority to determine the reasonableness of wholesale rates." *Miss. Power & Light*, 487 U.S. at 371. States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. *Id.*

FERC-mandated allocations of power are similarly binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." *Id.*

> States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. . . . When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.

Id. at 371-72.

Nor may states review "the prudence of a purchaser's participation in an integrated operating arrangement involving wholesale and retail transmissions between pool members." *Gulf States Utils. Co. v. Pub. Utils. Comm'n*, 841 S.W.2d 459, 467 (Tex. App.BAustin 1992, writ denied). However, this is not a rate case; this dispute instead deals with the decisions at a wholesale, inter-state level to use

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[14] Citing *Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517 (1947); *United States v. Pub. Utils. Comm'n of Calif.*, 345 U.S. 295, 308 (1953); *FPC v. S. Calif. Edison Co.*, 376 U.S. 205 (1964) (applying test set forth in *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)).

either system-generated higher-cost energy or lower-cost, off-system-generated purchased power.

2. Exclusive Jurisdiction as opposed to Primary Jurisdiction

Jenkins also urges that jurisdiction of the PUC will not attach because the remedy sought is not available through the PUC. This is a question of primary jurisdiction, which operates to allocate power between courts and agencies when both have authority to make initial determinations in a dispute. *Subaru*, 84 S.W.3d at 221. Texas courts have in the past confused the primary jurisdiction and exclusive jurisdiction doctrines, which are distinctly different and have different consequences when applied. *Id.* at 220. Despite similar terminology, primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional. *Id.* (citing *Shell Pipeline Corp. v. Coastal States Trading, Inc.*, 788 S.W.2d 837, 842 (Tex. App.BHouston [1st Dist.] 1990, writ denied)). Trial courts should allow an administrative agency to initially decide an issue when (1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview, and (2) great benefit is derived from an agency's uniform interpretation of its laws, rules, and regulations.

When an action is inherently judicial in nature, the courts will retain jurisdiction to determine the controversy *unless* the legislature by valid statute has expressly granted exclusive jurisdiction to the administrative body. *Amarillo Oil Co. v. Energy-Agri Products, Inc.*, 794 S.W.2d 20, 26 (Tex. 1990) (concluding that a suit to enjoin trespass by "sand fracking" could proceed in a judicial forum); *see also Foree v. Crown Petroleum Corp.*, 431 SW.2d 312, 316 (Tex. 1968) (finding that courts have jurisdiction

when the commission in issue is powerless to grant the relief sought). Absent such an exclusive grant, inherently judicial matters (such as a suit for damages under the Deceptive Trade Practices Act) remain within the jurisdiction of the courts. *Southwestern Bell Tel. Co. v. Nash*, 586 S.W.2d 647, 649-50 (Tex. Civ. App.BAustin 1979, no writ). Further, where the administrative agency is powerless to grant the relief sought and has no authority to make incidental findings which are essential to the granting of the relief, the doctrine does not apply. *Id.* While the Legislature has conferred exclusive original jurisdiction upon the Public Utilities Commission over the business and property of utilities in this state for the purpose of regulating rates, operations, and services,

> . . . we hold that jurisdiction over this tort claim against a telephone company has not been thus removed from the courts. Where the claim is not for future compliance but for damages based on past acts, the exhaustion of administrative remedies doctrine may not apply. The notion is based on the absence of a statute authorizing the Public Utility Commission to fix or adjudicate claims for damages.

Id. at 650; *see also Henderson v. Cent. Power & Light*, 977 S.W.2d 439, 447 (Tex. App. B Corpus Christi 1998, writ denied) (holding a cause of action for DTPA violations was not abrogated by the tariff, the document listing a public utility's services and the rates for those services); *Dolenz v. Southwestern Bell Tel. Co.*, 730 S.W.2d 44, 45 (Tex. App. B Houston [14th Dist.] 1987, no writ) (holding that jurisdiction over tort claims against a telephone company has not been removed from the courts).

3. Conclusion as to PUC

With respect to Jenkins' first issue, we conclude that the PUC does not have exclusive jurisdiction over this matter. The retail rate structure is not the object of Jenkins' pleadings, and the PUC cannot consider purchasing, selling or allocation decisions involving wholesale power sales where those decisions are made on an interstate basis between various companies. The federal power act, by limiting federal regulation of transmitting electric energy in interstate commerce to those matters which are not subject to regulation by states, does not preserve "exclusive state regulation of wholesale hydroelectric sales across state borders." *See United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 310 (1953) (citing 16 U.S.C. § 824(a)). State power does not extend to an interstate sale "in wholesale quantities, not to consumers, but to distributing companies for resale to consumers." *Id.* at 303 (citing *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927)).

Additionally, the suit before us is inherently judicial in nature, in which Jenkins brings state law tort claims based on those interstate purchasing and allocation decisions. We therefore conclude that the jurisdiction of the PUC is not primary in this instance. We sustain Jenkins' first issue on appeal.

E. FERC Jurisdiction and Preemption

The trial court below also determined that FERC has exclusive jurisdiction over the matters complained of in this suit. There is no dispute that FERC governs the Entergy System Agreement, the federal tariff pursuant to which the challenged decisions are made. Indeed, Jenkins concedes that the matters in issue fall within potential FERC juris-

diction, but not within its exclusive jurisdiction. Entergy contends FERC jurisdiction is exclusive, despite the federal court's order of remand.[15]

1. The Reach of FERC's Exclusive Jurisdiction

Congress chose to regulate the interstate sale of electricity through the wholesale rates that utility companies are permitted to charge. *See* 16 U.S.C. §§ 824, 824d; *Official Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Co.*, 378 F.3d 511, 518 (5th Cir. 2004). Although utility companies determine electricity rates through private contract negotiations, those rates must be filed with FERC and certified as "just and reasonable" to be lawful under the Federal Power Act. 16 U.S.C. § 824d(a), (c); *Potomac*, 378 F.3d at 518. FERC has the "exclusive authority to determine the reasonableness of wholesale [electricity] rates" under the Federal Power Act. *Potomac*, 378 F.3d at 518 (citing *Miss. Power & Light*, 487 U.S. at 371). That authority led to the development of the filed rate doctrine, which states that a utility's "right to a reasonable rate [under the Federal Power Act] is the right to the rate which the Commission files or fixes, and, . . . except for review of the Commission's orders, [a] court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Id.* (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963-64 (1986)).

Under the filed rate doctrine, "the reasonableness of rates and agreements regulated by FERC may not

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[15] The federal court, in declining jurisdiction, noted: "Even if they could have, Plaintiffs do not allege a violation of the Federal Power Act or any other federal law or regulation. Nor are they attempting to enforce a liability or duty under the Act."

be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Miss. Power & Light*, 487 U.S. at 375. Consistent with that position, the Supreme Court has held that district courts are preempted from awarding breach of contract damage awards calculated using a rate other than the rate filed with FERC. *Potomac*; 378 F.3d at 519 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 584-85 (1981)).

Many aspects of the interstate "transmission" or "sale" of wholesale energy pursuant to a federal tariff, and not merely matters involving rates, fall within FERC's exclusive jurisdiction. *See Calif. ex rel. Lockyer v. Dynegy*, 375 F.2d 831, 851 (9th Cir. 2004). There is a bright-line distinction between wholesale sales, which fall within FERC's plenary jurisdiction, and retail sales, over which the states exercise jurisdiction. *Id.* Moreover, the filed rate doctrine is not limited "to rates per se or FERC orders that deal in terms of prices or volumes or purchases." *Id.* (citing *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1056 (9th Cir. 2001); *Nantahala*, 476 U.S. at 966)). However, *Lockyer* is distinguishable in that it involved direct allegations that companies had failed to adhere to their tariff obligations to provide reserve energy capacity, thereby rendering the Independent System Operator[16] incapable of maintaining the grid's stability by maintaining supply and demand. Thus, those allegations went "directly to wholesale market activities" and

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[16] The "Independent System Operator" was defined as a non-profit, non-governmental public benefit corporation, set up to orchestrate the transmission and sale of electricity. *Calif. ex rel. Lockyer v. Dynegy*, 375 F.2d 831, 852 (9th Cir. 2004).

compliance with FERC tariff obligations; the fact that they were couched in terms of state law claims did not defeat FERC's preemptive jurisdiction. *Id.* at 852.

Similarly, in another case relied upon by Entergy, *In re Calif. Wholesale Elec. Antitrust Litigation*, 244 F. Supp.2d 1072, 1080 (S.D. Cal. 2003), *aff'd subnom. Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004), although claims were lodged in terms of state antitrust and unfair competition laws based upon alleged conduct in artificially inflating the price of electricity, FERC jurisdiction preempted the suit because the rates and violations of the tariffs were directly challenged.

> Plaintiff further alleges that it has been "forced to pay prices for electricity in excess of rates that would have been achieved by a competitive market" . . . [with the result of] wholesale energy being sold at prices that far exceed the price which energy would be sold in a truly competitive market. In relation to Plaintiffs['] UCL claim, it alleges defendants never filed their rates . . . the result of which deprived the public . . . of notice and information necessary to make informed decisions about rates.

Id. at 1075. The court concluded that it, along with other state or federal courts, was "prohibited from considering any rate other than that filed with FERC to be the appropriate wholesale rate. As such, the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *Id.* at 1077 (citing *H.J. Inc. v.*

Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8th Cir. 1992)).

However, *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1471-74 (5th Cir. 1987), concludes that courts are not preempted from awarding breach of contract damages based upon a theory that the breach increased the amount that was purchased, so long as damages are calculated using the filed rate. *Gulf States*, 824 F.2d at 1472. Courts may similarly set aside an energy contract obtained unconscionably or by fraud without interfering with FERC's rule-making power, so long as that order is not based upon a theory that the filed rate was too high. *Id.* While *Gulf States* recognized that setting aside a contract "would affect the filed rates by eliminating them," it held that the Federal Power Act does not preempt such indirect effects. *Id.* at 1472 n.9.

Whether FERC has exclusive jurisdiction under the Federal Power Act is therefore a close question dependent upon what exactly is in issue. Here, Jenkins does not bring a breach of contract claim; he does not allege fraud. Instead, he brings claims related to implementation of the System Agreement, the purchases and sale of power under it, and the prudence of those or other discretionary decisions that allegedly burden EGSI customers with higher-priced power, albeit at regulatory-approved rates. Jenkins asserts that the "choice not to purchase lower-cost power available from non-affiliates falls to the discretion of the Operating Companies," and that not all discretionary decisions are subject to FERC's exclusive jurisdiction.

2. Discretionary Decisions

It is clear that FERC jurisdiction is not exclusive or preemptive in all circumstances. *See* FERC Order

No. 888-B, 81 F.E.R.C. ¶ 61,248 at 61,018 (1997) ("[I]t is likewise clear that the Commission's jurisdiction to consider disputes arising under jurisdictional tariffs does not as a matter of law preclude state courts from also entertaining such disputes in the appropriate circumstances."). Such decisions are guided by *Ark. La. Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175 at 61,321 (1979), in which FERC stated that its assertion of jurisdiction depends upon three factors: (1) whether FERC has some special expertise that would make it the appropriate forum, (2) whether there is a need for uniformity in interpretation of the type of questions raised, and (3) whether the case is important in relation to the regulatory responsibilities of FERC. *Id.* at 61,322. In *Hall*, FERC determined that it had no special expertise in deciding non-technical questions, that there was no need for uniformity in interpreting terms defined by individual contracts, and that the matter did not impact FERC regulatory responsibilities. *Id.* at 61,323. FERC had no reason to preempt jurisdiction of the Louisiana court.

In *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003), the United States Supreme Court took under consideration the System Agreement involving the same family of companies as involved in this matter. That decision focuses on whether challenges could be raised to allocations of costs relating to non-operating generation units, and involved application of Schedule MSS-1 to the System Agreement. *Id.* at 41.

The court in *Entergy La.* determined that "[w]here, as here, public utilities share capacity, the allocation of costs of maintaining capacity and generating power constitutes the sale of electric energy at wholesale in interstate commerce." *Id.*

> The filed rate doctrine requires that interstate power rates filed with FERC or fixed by FERC must be given binding effect. . . . In *Nantahala* and *MP & L*, the Court applied the filed rate doctrine to hold that FERC-mandated cost allocations could not be second guessed by state regulators.[17]
>
> . . .
>
> The amended system agreement differs from the tariffs in *MP & L* and *Nantahala* because it leaves the classification of ERS units to the discretion of the operating committee, whereas in *Nantahala* and *MP & L* the cost allocations were specific mandates. The Louisiana Supreme Court concluded that this delegated discretion provided room for the LPSC's finding of imprudence. However, . . . [w]e see no reason to create an exception to the filed rate doctrine for tariffs of this type that would substantially limit FERC's flexibility in approving cost allocation arrangements. It matters not whether FERC has spoken to the precise classification of ERS units, but only whether the FERC tariff dictates how and by whom that classification should be made. Because the amended system agreement clearly

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[17] The state order in *Nantahala* allocated more of Nantahala's purchases to low-cost power than the proportion approved by FERC. By requiring Nantahala to calculate its rates as if it needed to procure less high-cost power than under FERC's order, the state order "trapped" a portion of the costs incurred by Nantahala and ran counter to the rationale for FERC approval of cost allocations. *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986)).

> does so, . . . second-guessing of the classification here is pre-empted.

Id. at 49-50.

Clearly, FERC-mandated allocations cannot be challenged except before FERC, and neither can discretionary decisions that would impact or impair FERC's flexibility in approving cost-allocation arrangements. The court therefore found the Louisiana Public Service Commission could not challenge as imprudent certain decisions made pursuant to the Entergy System Agreement, even though they fell within the limited discretion of the operating committee. *Id.* at 49.

In *Gulf States*, 824 F.2d at 1471, however, questions arose relating to the *amounts* of power purchased, with the court determining that decisions relating to quantities or amounts of power purchased are not preempted by the Federal Power Act. "While the FERC has exclusive [jurisdiction] over rates, it does not have jurisdiction over quantities except as quantities may affect rates." *Id.* Similarly, FERC has noted with respect to its own jurisdiction:

> [Atlantic City Electric Company], the [Public Advocate of New Jersey] and the [New Jersey Board of Public Utilities] . . . argue that the Commission did not consider the Board's findings that the Susquehanna power was unneeded and that the purchase was uneconomic. . . . [They] do not argue that PP&L's rates are excessive, but that the purchase is uneconomic from [Atlantic City Electric Company's] point of view. *We do not view our responsibilities under the Federal Power Act as including a determination that the*

> *purchaser has purchased wisely or has made the best deal available.*

Pa. Power and Light Co., 23 F.E.R.C. ¶ 62,325 at 61,716 (1983) (emphasis added). "[FERC] has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options." *Cent. Vt. Pub. Serv. Corp.*, 84 F.E.R.C. ¶ 61,194 at 61,975 (1998) (citing *Pa. Power and Light Co.*, 23 F.E.R.C. ¶ 62,325 at 61,716). That is exactly what appears to be in issue here.

Entergy urges, nevertheless, that the purchases and allotments challenged by Jenkins, involving transactions between the companies that are parties to the System Agreement, necessarily involve FERC *mandated* purchases. We have already acknowledged that if a purchaser has no legal right to refuse to buy that power, or no legal choice but to make a particular purchase, FERC jurisdiction will apply. *See Cent. Vt. Pub. Serv. Corp.*, 84 F.E.R.C. ¶ 61,194 at 61,975. Entergy relies on *Middle South Energy, Inc.*,[18] 31 F.E.R.C. ¶ 61,305 at 61,661 (1985), for the proposition that EGSI's purchases are mandatory. That decision found no incentive structure existed between the parties to the System Agreement because "the interchange transactions are wholly within the integrated System, are centrally dispatched, and are mandated by MSS [Entergy] rather than the individual companies." *Id.* However, the agreement reflects those interchange transactions are not mandated by

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[18] The Enetergy system of companies was formerly identified as Middle South Utilities, and cases involving Middle South Energy or related entities involve the same (or predecessor) system agreement in issue here.

FERC, but instead are delegated to the operating committee, to which the participating companies must defer. Therefore, these decisions are not "legally mandated" as contemplated by *Miss. Power & Light*, 487 U.S. at 371, or *Entergy La.*, 539 U.S. at 49-50. We interpret the discretionary decisions in issue as being the type that do not impact or impair FERC's flexibility in approving cost-allocation arrangements. *Cf. Entergy La.*, 539 U.S. at 41.

3. The Question of Damages

Entergy argues that Jenkins' damage claims place this matter within FERC's exclusive jurisdiction. Jenkins prays for the "difference between the true price for power that should have been charged Plaintiffs and the actual price charge to Plaintiffs for the Entergy System Pool power," or alternatively for a disgorgement of "ill-gotten gains and profits earned."

We agree that the filed rate doctrine bars a claim that would require this Court to measure the difference between the allegedly fixed wholesale price and an otherwise "just and reasonable wholesale price," regardless of whether the claim itself is couched in state law terms. *Calif. Wholesale Elec.*, 244 F. Supp.2d at 1078. We nevertheless conclude that this is not the measure of damage pursued by Jenkins. *Cent. Vt. Pub. Serv. Corp.*, 84 F.E.R.C. ¶ 61,194 at 61,975, involved FERC's acceptance of its annual cost report filing under its RS-2 wholesale rate schedule with Connecticut Valley Electric Company. FERC specifically made no determination as to whether it was prudent for the purchaser to enter into a contract, or whether, over time, it had become imprudent for the purchaser not to exercise termination rights in order to purchase cheaper power elsewhere. *Id.* FERC took no position on whether Connecticut Val-

ley had other power supply choices available, or whether it acted imprudently. *Id.*

Jenkins does not challenge the rate structure by which claimed damages would be calculated. He accepts the rates for all electricity, however acquired. Jenkins does not allege any textual violations of the System Agreement, or breach of contract. Jenkins does not challenge the rates or the FERC-approved formulas, but instead the discretionary decisions that directed who would benefit from the cheaper power. *Cf. La. Pub. Serv. Comm. v. Entergy Servs.*, 106 F.E.R.C. ¶ 63,012 at 65,104 (2004)[19] (involving direct challenges to the System Agreement's cost allocation formulas and alternative claims that the System Agreement had been violated).

There is a distinction between Jenkins' allegations and cases such as *Calif. Wholesale Elec.*, where the plaintiffs asserted that absent the power companies' improper conduct and anti-competitive acts, they would have paid different "rates." *Calif. Wholesale Elec.*, 255 F. Supp.2d at 1080. The plaintiffs in *Calif. Wholesale Elec.* sought as redress the difference between the charged rates and the different, hypothetical rates they believed would have "been achieved in a competitive market." *Id.* at 1077. Because the court would be "expressly required to assume 'a hypothetical rate different from that actually set by FERC,'" FERC jurisdiction prevailed. *Id.* Such is not the case here.

4. The System Agreement

We have also reviewed the portions of the System Agreement cited by Entergy for the proposition that

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[19] *Aff'd in part and rev'd in part*, 111 F.E.R.C. ¶ 61,311 at 62,350 (2005).

the agreement controls the prudence of purchases of power by the operating committee, and therefore FERC jurisdiction is exclusive. The cited portions of the agreement reflect the following: (1) the companies, with the consent of or under conditions specified by the operating committee, may agree to purchase capacity or energy from outside sources and if purchased by the operating company, shall be allocated amongst the companies in any manner mutually agreeable to them; (2) the operating committee may purchase energy under economic dispatch or emergency conditions; (3) the operating committee is to ensure the continuous supply or capacity of energy, provide for and coordinate safe dispatching, the proper distribution of reserves, coordinate negotiations for the interchange and sale of power and energy, including the sale and delivery to others on a profitable basis of power and energy not required for system purposes, and to secure power from external sources as may be required or will result in savings to the companies; and (4) the operating committee shall determine availability of energy for purchase from or sale to outside systems in an economical manner.

The discretion reflected in these provisions is broad. The fact that the operating committee has such discretion granted in the System Agreement does not mandate that FERC oversee each of these decisions. Indeed, FERC has specifically declined to consider the prudency or wisdom of a purchaser's choices between available power supply options, or whether a purchaser "has made the best deal available." *Pa. Power and Light Co.*, 23 F.E.R.C. ¶ 62,325 at 61,716; *Cent. Vt. Pub. Serv. Corp.*, 84 F.E.R.C. ¶ 61,194 at

61,975 (citing *Pa. Power and Light Co.*, 23 F.E.R.C. ¶ 62,325 at 61,716.)[20]

We further note the observations of the federal court in its order remanding the case before us to state court:

> None of the Texas common law or statutory causes of action cited by Plaintiffs in their Petition require the violation of a federal tariff. Conduct that violates the tariff may also violate the TTLA [Texas Theft Liability Act] or other common-law duties, but a violation of the tariff is not an essential element to any of Plaintiffs' claims. Plaintiffs can conceivably prove their state-law claims by providing evidence that Defendants used fraudulent accounting techniques to overcharge customers. This type of case would not require Plaintiffs to reference the tariff during the presentation of their case. This is not to say the tariff would never be mentioned in a trial of this controversy . . . but the fact remains that the federal tariff at issue is not an essential element to any of Plaintiffs' claims.[21]

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[20] We note Entergy's argument that *La. Pub. Serv. Comm'n v. Entergy Servs.* involves similar issues. However, in that matter, the complaint went directly to how the schedule MSS-3 formulas were being implemented, thus challenging compliance with the FERC approved System Agreement. *See La. Pub. Serv. Comm. v. Entergy Servs.*, 106 F.E.R.C. ¶ 63,012 at 65,104 (2004). Jenkins' claims in this matter are not so couched.

[21] Jenkins contends that this federal court order should direct our decision in this matter. However, no appropriate theories apply in the situation before us to support that argument. Res judicata, also known as claim preclusion, prevents the relitigation of a finally adjudicated claim and related matters that should have been litigated in a prior suit. *State and County*

We conclude that, while FERC jurisdiction could potentially expand to encompass this dispute, FERC does not have exclusive or preemptive jurisdiction over the claims brought by Jenkins in this matter. We sustain Jenkins' contentions in his second and third issues, concluding that FERC does not have exclusive preemptive jurisdiction over these proceedings and that the trial court erred in dismissing the matter for lack of subject matter jurisdiction.

Conclusion

We make no determinations of the merits in the underlying case. We affirm the trial court's refusal to strike the intervention of EGSI, finding no abuse of discretion. We reverse the trial court's order dismissing the matter for lack of subject matter jurisdiction, and remand for further proceedings.

ERRLINDA CASTILLO
Justice

Opinion delivered and filed
this the 2nd day of March, 2006.

Mut. Fire Ins. Co. v. Miller, 52 S.W.3d 693, 696 (Tex. 2001). The "law of the case" doctrine is the principle under which questions of law "decided on appeal to a court of last resort" will govern the case throughout its subsequent states." [sic] *Id.* Collateral estoppel is narrower than res judicata, precluding only the relitigation of identical ultimate issues of fact that have already been actually litigated and that were essential to the judgment in a prior suit. *See Bonniwell v. Beech Aircraft Co.*, 663 S.W.2d 816, 818 (Tex. 1984). "Collateral estoppel issues concern only whether: (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action, and (2) those facts were essential to the judgment in the first action." *Johnson & Higgins v. Kenneco Energy*, 962 S.W.2d 507, 519 (Tex. 1998). Jenkins urges that collateral estoppel should and can apply to a case after remand from federal court. We need not make this determination here inasmuch as collateral estoppel applies to fact issues, and jurisdiction is a question of law.

APPENDIX C

IN THE DISTRICT COURT OF
CHAMBERS COUNTY, TEXAS
344TH JUDICIAL DISTRICT

[Filed DEC. 17, 2004]

CAUSE NO. 20666

DAVID JENKINS *and* CINDY JENKINS,
individually and on behalf of all persons similarly situated

vs.

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 296, Tex. R. Civ. P., and the timely request of the plaintiffs herein, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

The Court's decision in this case was based on: the pleadings of the parties, taking the factual allegations of Plaintiffs' First Amended Original Petition as true; the briefing and argument of counsel regarding jurisdiction; the applicable authorities; and the affidavits, including attachments thereto, of James Stephen Dingle and Lewis Barry Howell. The Court also considered the admissible portions of the affida-

vits, including attachments, of Robert Means and Jo Campbell, but did not consider the legal conclusions in the latter two affidavits and, to that extent, sustains defendants' objections. Based on the foregoing, there were no issues of fact material to the Court's decision raised, and there are no contested facts for the Court to find.

Conclusions of Law

1. Plaintiffs' complaints under all asserted causes of action in their live pleading address matters governed by the Entergy System Agreement, which is a tariff filed with and accepted by the Federal Energy Regulatory Commission ("FERC").

2. The actual damages sought by plaintiff under all asserted causes of action is the difference between the price paid by them for electric service from EGSI and the price they would have paid if available lower-priced power had been allocated to EGSI.

3. Under the Federal Power Act, as interpreted by numerous court decisions, FERC possesses exclusive jurisdiction over interpretation, violations, enforcement, and amendment of federal electric tariffs, and court actions (except for judicial review of FERC decisions) complaining of actions taken and decisions made under approved federal tariffs are preempted.

4. The amount paid by plaintiffs and other retail customers of EGSI for electrical service in Texas is within the exclusive jurisdiction of the Texas Public Utility Commission, pursuant to the Public Utility Regulatory Act.

5. Both because the acts and decisions of which plaintiffs complain are matters within the exclusive jurisdiction of FERC and because the relief they seek

is within the exclusive jurisdiction of the PUC, this Court lacks subject matter jurisdiction over this action pursuant to Tex. Const. art. V, § 8, which divests this Court of jurisdiction when exclusive jurisdiction is conferred by law on an administrative agency.

Signed this the 17th day of December, 2004.

/s/ Carroll E. Wilborn, Jr.
HON. CARROLL E. WILBORN, JR., Judge Presiding

APPENDIX D

IN THE DISTRICT OF
CHAMBERS COUNTY, TEXAS
344TH JUDICIAL DISTRICT

[Filed NOV. 24, 2004]

CAUSE NO. 20666

DAVID JENKINS *and* CINDY JENKINS,
individually and on behalf of all persons similarly situated

vs.

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.

FINAL JUDGMENT OF DISMISSAL

On October 5, 2004, came on for hearing Defendants' Motion to Dismiss for Want of Jurisdiction, all parties appearing by counsel of record, and the Court, having considered said motion, the briefing of the parties, the admissible evidence and the argument of counsel being of the opinion that the motion has merit and that this Court lacks subject-matter jurisdiction in the premises, it is accordingly

ORDERED, that this suit be, and it is hereby, DISMISSED for want of jurisdiction at plaintiffs' cost.

This is intended to be an appealable final judgment, disposing of all parties and claims.

SIGNED this the 24th day of November, 2004.

/s/ Carroll E. Wilborn, Jr.
CARROLL E. WILBORN, JR., Judge Presiding

APPENDIX E

August 17, 2007

Mr. David C. Duggins
Clark Thomas Winters
PO Box 1148
Austin, TX 78767

Mr. Joseph D. Jamail
Jamail & Kolius
500 Dallas, Suite 3434
Houston, TX 77002-4793

Mr. John H. Conway
Brickfield Burchette Ritts & Stone
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, DC 20007

RE: Case Number: 06-0409
Court of Appeals Number: 13-05-00035-CV
Trial Court Number: 20666

Style: ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.

v.

DAVID JENKINS AND CINDY JENKINS, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

Sincerely,

/s/ Blake A. Hawthorne
BLAKE A. HAWTHORNE, Clerk
by Claudia Jenks, Chief Deputy Clerk

cc: Mr. R. B. Scherer Jr.
Ms. Cathy Wilborn
Mr. Larry W. Brewer
Mr. John R. Hulme
Honorable Thomas R. Phillips

APPENDIX F

CONSTITUTIONAL PROVISIONS

U.S. Const. art I, § 8, cl. 3

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

FEDERAL STATUTES

16 U.S.C. § 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and sub-

chapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(c) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f)[1], 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

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[1] There is no subsec. (f) in 824e.

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C.A. § 16451 et seq.].

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the

rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and

place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the

refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or

in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e)(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

16 U.S.C. § 825e. Complaints

Any person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee, transmitting utility, or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee, transmitting utility, or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

APPENDIX H

ENTERGY

System Agreement

Agreement Among:

Arkansas Power & Light Company
Gulf States Utilities Company
Louisiana Power & Light Company
Mississippi Power & Light Company
New Orleans Public Service Inc.
Entergy Services, Inc.

[Logo]

AGREEMENT

Among

ARKANSAS POWER & LIGHT COMPANY

GULF STATES UTILITIES COMPANY

LOUISIANA POWER & LIGHT COMPANY

MISSISSIPPI POWER & LIGHT COMPANY

NEW ORLEANS PUBLIC SERVICE INC.

ENTERGY SERVICES, INC.

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ARTICLE III

OBJECTIVES

3.01 The purpose of this Agreement is to provide the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the Companies in such a manner as to achieve economies consistent with the highest practicable reliability of service, subject to financial considerations, reasonable utilization of natural resources and minimization of the effect on the environment. This Agreement also provides a basis for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies.

3.02 It is recognized by the Companies that economies of scale and integrated operations require that the planning, construction and operation of the bulk power supply and related facilities of the Companies be on a coordinated basis.

3.03 It is recognized that the Companies have traditionally used natural gas as their primary boiler fuel and that curtailments by suppliers have necessitated a conversion to oil as boiler fuel. Minimizing current and future costs of electricity and reducing energy dependence on oil and gas require the Companies to move toward a new fuel base of coal and nuclear.

3.04 It is recognized that these new coal and nuclear units will be Base Generating Units as defined in 2.08 and will be units of the larger ratings in generating stations of large size, strategically located with regard to fuel, water supply and electric load.

3.05 It is the long term goal of the Companies that each Company have its proportionate share of Base Generating Units available to serve its customers either by ownership or purchase. Any Company which has generating capacity above its requirements, which desires to sell all or any portion of such excess generating capacity and associated energy, shall offer the right of first refusal for this capacity and associated energy to the other Companies under Service Schedule MSS-4 Unit Power Purchase.

3.06 It is recognized that the installation of large base generating stations at locations, in many cases necessarily remote from major load centers, will require the installation of additional major high voltage and extra high voltage transmission lines and substations to connect these large generating stations to the major load centers in a manner to assure the highest practicable reliability of service.

3.07 It is recognized that reliability of service and economy of operation require that the energy supply to the system be controlled, to the extent practicable, from a centralized dispatching office and that this will require adequate communication facilities and the provision of economic dispatch computer facilities and automatic controls of generation.

3.08 By jointly planning on a systemwide basis for the construction and operation of these major facilities:

(a) The combined loads of the Companies can be supplied with less aggregate installed capacity; and

(b) Installations of additional capacity can be made at lower cost per kW because of the large unit sizes; and

(c) The new installations will be more economical and require less operating labor and maintenance per kW because of the larger unit sizes; and

(d) The strengthened transmission system will, make possible a fuller utilization of the capability of the lower cost generating units of the System; and

(e) Emergency conditions in any part of the System or other systems in adjacent areas can be met with less probability of impairment of service to the general public.

3.09 It is intended that each Company shall be willing and able to provide its portion of the major facilities determined to be necessary and each Company shall share in the benefits and pay its share of the costs of coordinated operations as agreed upon in accordance with Service Schedules to be attached hereto from time to time and made a part hereof.

ARTICLE IV

OBLIGATIONS

4.01 Production Facilities

Each Company shall normally own, or have available to it under contract, such generating capability and other facilities as are necessary to supply all of the requirements of its own customers.

Each Company shall furnish the Operating Committee, at the time and in the manner designated, estimates of its annual peak load for the next succeeding 10-year period, or such period as may be required, together with estimates of its capability available from generating units in operation, under

construction or already approved, capability available from other sources under contract and Qualified Cogeneration Capacity or Qualified Small Power Production Capacity in accordance with Sections 2.12 and 2.13 of this Agreement.

The Operating Committee shall then determine a generation addition plan to provide capacity for the projected system load and furnish reliable service to customers at the lowest cost Consistent with sound business practice. Any anticipated large blocks of power sales not previously submitted to the Operating Committee shall be submitted to the Operating Committee as soon as load information is available so that appropriate capacity can be Scheduled into the generation addition plan.

Each Company that installs a Generating Unit will make the necessary financial arrangements and promptly proceed with the design and construction of the unit to meet the "in-service" date of the generation addition plan.

Any Capability in excess of the Capability Responsibility of a Company that may exist in the system of one or more Companies as a result of installation of facilities in accordance with the provisions of the generation addition plan shall be equalized among the Companies in accordance with the provisions of the applicable Service Schedule.

4.02 Purchased Capacity & Energy

The Companies, with the consent of or under conditions specified by the Operating Committee, may agree to a contract by one or more of them, for the purchase of capacity and/or energy from outside sources for the account of a Company or Companies.

If purchased by a Company for its own account, the capacity shall be included by the purchasing Company in its Capability to the extent provided by the applicable Service Schedule. The energy purchased shall be considered as part of the purchasing Company's energy supply.

If purchased by a Company for the joint account of less than all of the Companies, the capacity and energy shall be allocated among the purchasing Companies in any manner mutually agreeable to them.

If purchased by a Company for the joint account of all the Companies, the capacity and energy shall be allocated to each Company in proportion to its Responsibility Ratio in effect at the end of the preceding month. Each Company shall include its allocated portion of the capacity, so purchased, in its Capability to the extent provided by the applicable Service Schedule and shall include its portion of the energy so purchased in its energy supply. Each Company shall pay for capacity and energy allocated to it hereunder at the rates paid by the Company making the purchase.

4.03 Energy Purchased by Services

Services, through the System Operations Center, may purchase energy under economic dispatch or emergency conditions, in accordance with Article VI paragraph 6.02 of this Agreement, for the joint account of all the Companies. The energy purchased shall be allocated to each Company in proportion to its Responsibility Ratio in effect at the end of the preceding month.

4.04 Capacity, and Energy' Exchanged with Outside Systems

Capacity and energy may be delivered to or received from an outside system under agreements providing for a return in kind. The accounting for such deliveries and receipts shall be as follows:

(a) If the System supplies first, the obligations to supply shall be prorated to each Company, in proportion to its Responsibility Ratio in effect as of the preceding October 31st, and the capacity and energy which each Company is entitled to receive in return shall be equal to the obligation to supply.

(b) If the System receives first, the capacity and energy to be received shall be prorated to each Company in proportion to its Responsibility Ratio in effect as of the preceding October 31st, and each Company shall be obligated to supply in return the amount of capacity and energy that it was entitled to receive.

4.05 Sales to Others for the Joint Account of All the Companies

Sales of capacity and energy to others for which any Company does not wish to assume sole responsibility, shall, with the consent of or under conditions specified by the Operating Committee, be made by the Company having direct connection with such others, for the joint account of all the Companies, and the net balance derived from such sales shall be divided among the Companies as provided in the applicable Service Schedule.

4.06 Transmission Facilities

The Companies own and operate extensive transmission systems traversing their operating areas and interconnecting with each other, as well as with the transmission systems of adjacent utilities.

It is agreed that portions of each Company's bulk power transmission system shall be equalized in accordance with the applicable Service Schedule so that the ownership costs of those transmission facilities shall be distributed equitably among the Companies.

The Operating Committee shall make studies of bulk power transmission facilities and agree upon the facilities that will be required to transmit the power supply from generating or other sources to the load centers. The facilities agreed upon shall be built to comply with a time schedule determined by the Operating Committee and shall be adequate to provide the bulk power transmission system requirements with due allowances for contingencies that may reasonably be expected. The Operating Committee shall agree on the general routes of bulk power transmission lines, the voltages and conductor sizes, and the location of substations which are covered by this Agreement.

4.07 Communication and Other Facilities

The Companies shall provide communication and other facilities, determined by the Operating Committee to be necessary for metering, control, protection and dispatch of the production and transmission facilities, and for such other purposes as may be necessary or desirable for the operation of the Companies' Systems.

4.08 Dispatch

Under general direction of the Operating Committee, Services will operate a centralized operations center properly equipped and staffed to dispatch the capacity and energy capability of the Companies, in the efficient, economical, and reliable manner as provided in this Agreement. All generating units, included in System Capability under this Agreement, presently in operation or installed in the future, shall be equipped with such controls as may be determined by the Operating Committee to be necessary to accomplish such centralized economic dispatch.

It is recognized by the Companies that, because of such economic dispatch, a Company may not, at all times, be supplying the energy requirements of its system, but may be taking energy from the resources of the other Companies or supplying energy to the other Companies. The payments or charges for such energy exchange shall be as provided in the applicable Service Schedule.

4.09 Records and Reports

Services shall keep such records as may be necessary for the efficient administration of the Agreement, and shall make such records available to any Company on request. Each Company shall make all reports requested by the Operating Committee within the time prescribed.

4.10 Regulatory Authorization

This Agreement is subject to certain regulatory approvals and each Company shall diligently seek all necessary regulatory authorization for this Agreement and the performance of its obligations thereunder.

4.11 Effect on Other Agreements

This Agreement shall not modify the obligations of any Company under any Agreement between that Company and others not parties to this Agreement in effect at the date of this Agreement.

4.12 Service Schedules

The basis of compensation for the use of facilities and for the capacity and energy provided or supplied by a Company to another Company or Companies under this Agreement shall be in accordance with arrangements agreed upon from time to time among the Companies. Such arrangements shall be in the form of Service Schedules, each of which, when signed by the parties hereto, and approved or accepted for filing by appropriate regulatory authority shall be attached to and become a part of this Agreement.

Each Company reserves the right to unilaterally seek amendments or changes in the terms and conditions of service and increases or decreases in the rates and charges provided in any of the Service Schedules from any regulatory body having or acquiring jurisdiction thereover.

4.13 Measurements

All capacity and energy measurements, such as between the Systems of the Companies, shall be made at or corrected to the points of interconnection unless otherwise agreed to by the Operating Committee.

4.14 Billings

Bills for services rendered hereunder shall be calculated in accordance with applicable Service Schedules, and shall be issued on the fifth working day of

the month following that in which such service was rendered and shall be payable on or before the 15th day of such month. After the 20th day, interest shall accrue on any balance due at the rate as determined in Section 35.19a(2)iii of the FERC Regulations, or at such other rate established by the Operating Committee.

4.15 Waivers

Any waiver at any time by a Company of its rights with respect to a default by any other Company under this Agreement, shall not be deemed a waiver with respect to any subsequent default.

4.16 Successors and Assigns

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the respective Companies here to, but shall not be assignable by any Company without the written consent of the other Companies, except upon foreclosure of a mortage or deed of trust.

4.17 Amendment

This Agreement may be changed, amended, or supplemented, only by an instrument in writing, signed by all the Companies.

4.18 Independent Contractors

It is agreed among the Companies that by entering into this Agreement providing for the coordinated planning, construction and operation of power production, transmission, communications and other facilities of the Companies, the Companies shall not become partners, but as to each other and to third persons, the Companies shall remain independent contractors in all matters relating to this Agreement.

4.19 Responsibility for Loss or Damage

Each Company shall defend, indemnify, and save harmless the other Companies, against liability, loss, costs and expenses on account of any injury or damage to persons or property occurring on or in connection with its facilities on its side of any of the points of interconnection, except to the extent such injury or damage was caused by the sole or contributory negligence of another Company, its agent or employees.

ARTICLE V

COMPOSITION AND DUTIES OF THE OPERATING COMMITTEE

5.01 Operating Committee

An Operating Committee shall be the administrative organization of this Agreement and shall consist of members designated by the chief executive officers of each Company and by the chief executive officer of the Parent Company. Such designation shall be by written notice to the Secretary of the Operating Committee with copies to each of the other Companies. The Companies and the Parent Company may change its designated members at any time by written notice to the Secretary of the Operating Committee and each of the other Companies.

5.02 Officers of the Operating Committee

The Operating Committee shall have the following officers with duties as designated:

(a) Chairman—The Chairman shall issue calls for and shall preside at meetings of the Operating Committee. He shall have responsibility for the general coordination of

the Operating Committee functions among the various members.

(b) Vice Chairman—The Vice Chairman shall perform the duties of the Chairman in his absence or incapacity.

(c) Secretary—The Secretary shall be responsible for keeping the minutes of the meetings of the Operating Committee and for preparing copies thereof and for distributing them to the Companies. The Secretary shall be responsible for obtaining written approval from the Companies for any acts or decisions of the Operating Committee which may require such written approval, and shall be responsible for distributing copies of such approvals to the Companies.

The Chairman and Vice Chairman shall be elected from the members by majority vote at the first meeting held in each calendar year and shall take office immediately upon being elected.

The Secretary shall be designated by the Operating Committee.

5.03 Meeting Dates

The Operating Committee shall hold meetings at least quarterly and at any time upon the request of a member, and shall keep minutes of its proceedings.

5.04 Decisions

All decisions of the Operating Committee shall be by a majority vote. For the purposes of voting, the Parent Company shall have twenty (20) percent of the vote and the remaining eighty (80) percent shall be divided among the Companies in proportion to

each Company's Responsibility Ratio in effect as of the preceding December 31st.

5.05 Attendance at Meetings

Each Company and the Parent Company shall be represented at each Operating Committee meeting by their members on the Committee or a proxy designated by the member or chief executive officer. Such proxy member need not be an employee of the Company represented.

5.06 Duties

The Operating Committee shall:

(a) Be responsible for the day-to-day administration of the Agreement and for the filing of this Agreement and any amendments thereto with the Federal Energy Regulatory Commission for approval or acceptance for filing and for distributing copies of such filings to the Companies.

(b) Make the studies required to fulfill the obligations agreed to in the Article IV of this Agreement, and its decisions shall become the basis for the installation of generation, bulk power transmission, communication, and other facilities necessary for the supply of capacity and energy to the System.

(c) Determine the amount of and require installation of adequate reserves of System Capability to assure, insofar as practicable, the continuous supply of capacity and energy to the major load centers of the System.

(d) Establish safe loading criteria for generating units, transmission lines and any other facilities necessary for the supply of power and

energy to the major load centers of the System.

(e) Promulgate whatever standards may be required for the safe and reliable operation of the System.

(f) Consult with and provide general supervision for Services in employing and supervising a System Operator and provide for such assistance as needed.

(g) Determine the need for and generally supervise the keeping of records and the making of such reports as are deemed necessary or appropriate.

(h) Determine the need for and generally supervise communications, interchange and automatic generation control, metering, economic dispatch and relaying facilities necessary for the purpose of this Agreement.

(i) Make any determinations required for the purpose of administering any schedules subject to its administration.

* (j) Study and determine from time to time additions or changes in facilities necessary to keep abreast of the production and transmission requirements of the System.

(k) Provide for and coordinate safe dispatching, switching and other routine procedures.

(l) Provide for proper distribution of spinning reserves and the supply of reactive kVa.

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* Typographical correction: "of" changed to "or".

(m) Establish, amend, supplement or terminate from time to time rules, procedures or practices as necessary to insure functioning of the System within the scope of this Agreement.

(n) Coordinate negotiations with others from time to time for interchange and sale of power and energy.

(o) Coordinate arrangements for the sale and delivery to others on a profitable basis, of power and energy not required for System purposes.

(p) Coordinate arrangements from time to time to procure for the Companies, or for their account, such power and energy from external sources as may be required or will result in savings to the Companies.

(q) Keep abreast of all environmental factors as they affect the operation of the System in order to comply with all established criteria for minimizing pollution.

(r) Undertake any other duties that may from time to time be assigned to it or deemed appropriate.

5.07 Employment of Consultants

The Operating Committee, in the performance of its duties, may employ such technical and consulting services as warranted.

5.08 Expenses of Committee

Each Company (except the Parent Company) shall pay the expenses of its representatives on the Operating Committee. The expenses of the representatives

of the Parent Company shall be paid by Services. Any other expenses of the Committee shall be prorated among the Companies as determined by the Operating Committee.

ARTICLE VI

SYSTEM OPERATIONS CENTER

6.01 System Operations Center

The operation of the System shall be controlled by the System Operations Center which is operated by Services.

6.02 Duties

Services through the System Operations Center shall:

(a) Determine the most effective scheduling of sources for the reliable supply of power and energy on an economical basis to the Companies.

(b) Supervise the operation and maintenance of computer facilities specified by the Operating Committee for the following purposes:

1. Economic system dispatch,
2. Determination of billing information, and
3. Determination of other data required by the Operating Committee.

(c) Supervise safe switching procedures and other routine procedures in the system.

(d) Determine the availability of energy for purchase from or sale to outside systems on an economical basis under effective contracts

and arrange for and schedule such transactions.

(e) Coordinate the operation of communication facilities owned or leased by the Companies to provide the communication essential to the safe, reliable and economical operation of the System.

(f) Maintain such records and prepare such reports as the Operating Committee designates.

6.03 Expenses

All expenses of the Systems Operations Center shall be paid by Services and billed monthly to each Company in accordance with the applicable Service Schedule.

* * * *

SERVICE SCHEDULE MSS-3
EXCHANGE OF ELECTRIC ENERGY AMONG THE COMPANIES

30.01 Purpose

The purpose of this Service Schedule is to provide the method of pricing energy exchanged among the Companies.

30.02 Scheduling of Energy Sources

The System Capability shall be operated as scheduled and/or controlled by the System Operator to obtain the lowest reasonable cost of energy to all the Companies consistent with the requirements of daily operating generation reserve, voltage control, electrical stability, loading of facilities and continuity of service to the customers of each Company.

In no event shall the remaining margin payment obligations of Gulf States to Southwestern Electric Power Corporation under Section 9.1 of the Restated and Amended Interconnection Agreement between Gulf States and Southwestern Electric Power Company, be included, considered or otherwise taken into account by the System Operator under Section 30.02 of the System Agreement, except for the circumstance where the lowest reasonable cost energy available to the System Operator is identical in price to that offered to Gulf States under such Section 9.1.

30.03 Allocation of Energy

The energy from the lowest cost source available and scheduled as in Section 30.02 above shall be allocated on an hourly basis, in the order of the following priorities:

(a) first to the loads of the Company having such sources available, except that in the case of energy generated by a Designated Generating Unit, each Company to which a portion of the Capability of the Designated Generating Unit as defined in Section 40.02 has been sold shall be entitled to receive each hour that portion of the total energy generated by the Designated Generating Unit that the capability sold to the Company bears to the total capability of the Designated Generating Unit.

(b) second to supply the requirements of the other Companies' Loads (Pool Energy).

30.04 Energy for Sales to Others

Energy used to supply others will be provided in accordance with rate schedules on file with the Federal

Energy Regulatory Commission. A Company will be reimbursed for the current estimated cost of fuel used by the specific unit or units supplying the energy together with the adder determined in Section 30.08(f) on an hour by hour basis.

30.05 Unscheduled Energy

Energy produced by generating units not scheduled for system energy requirements but operated at the request of a Company beyond what is deemed necessary for overall system purposes by the System Operator, shall not be considered as part of Sections 30.03 or 30.04 above, but shall be for the use, and at the expense of the Company requesting the operation of such generating units.

30.06 Fuel Contract Energy

Energy produced by generating units for system energy requirements shall be allocated as follows:

(a) When operated to satisfy "take or pay" minimums under fuel contracts negotiated for System benefit as approved by the Operating Committee shall be shared by all companies in proportion to their current Responsibility Ratio.

(b) When operated with fuel acquired for the benefit of two or more of the Companies shall be shared in proportion to their participation in such contracts.

(c) When operated pursuant to fuel purchases negotiated for System benefit as approved by the Operating Committee, the Company owning the units utilizing the fuel has a one-time option to either assume responsibility for purchase of the fuel for its own account or to

allow the fuel to be purchased for the System's joint account in accordance with 30.06(a) or (b) as appropriate.

30.07 Cogeneration or Small Power Production Energy

Energy received by any Company from Cogeneration or Small Power Production Sources that is included as a part of Inter-Company billings shall be priced under this Agreement in accordance with rates established by the appropriate regulatory authority. The Operating Committee shall have the authority to allocate such energy to one or more of the Companies or to determine that the energy is for the use, and at the expense of, the Company making the purchase from such Source in accordance with FERC Opinion Nos. 246 and 246-A.

30.08 Payments to be Received for Energy Supplied

Each Company shall receive, for energy furnished in accordance with Sections 30.03 (a), (b) and 30.04 in excess of its load requirements, on an hourly basis:

(a) For each kWh generated as short term purchase energy from a Designated Generating Unit in accordance with Section 30.03(a), whether or not taken by the Company or Companies making the purchase, the cost of fuel consumed.

(b) For each kWh generated by use of fossil fuel, in accordance with Sections 30.03(b) and 30.04, the cost of fuel consumed plus an adder as determined in Section 30.08(f).

(c) For each kWh generated as Fuel Contract Energy, in accordance with Section 30.06, the cost of fuel consumed plus an adder as determined in Section 30.08(f).

(d) For purchased energy, the actual cost of such purchased energy. The "actual cost" of purchased energy for Gulf States shall not include the remaining margin payment obligation of Gulf States to Southwestern Electric Power Company, under Section 9.1 of the Restated and Amended Interconnection Agreement between Gulf States and Southwestern Electric Power Company.

(e) For each kWh received as Cogeneration or Small Power Production energy in accordance with Section 30.07, the price established in Section 30.07.

(f) The adder for Sections 30.08(b) and 30.08(c) shall be determined pursuant to the following formula.

Adder =A + B

Where:

$$A = .5563 \frac{\text{O\&M (current)} \div \text{NSGC}}{\text{O\&M (base)} \div \text{NSGB}}$$ where,

A = O&M adder in mills/kWh adjusted annually

O&M = Accounts 500, 502, 503, 504, 505, 506, 507, 510, 511, 512, 513 and 514

Current = Three years ending with preceding year

NSGC = Net Steam generation in kWh for the three years ending with preceding year

Base = Three years of 1978, 1979 and 1980

NSGB = Net steam generation in kWh for 1978, 1979 and 1980 base period

.5563 = The amount applicable at the date of this agreement

O&M (base) ÷ NSGB = 1.6724

B =AC x HR x (SR/2,000,000) where,

B = incremental replacement SO^2 cost (in mills/kWh) for the particular generting unit, adjusted weekly

AC = allowance cost (in $/allowance), adjusted weekly based on the average cost of purchasing an emission allowance from an index accepted by FERC within a test block approximately equal to the amount of emission allowances needed to support wholesale transactions under this System Agreement and power sales arrangements between the Companies and others.

HR = hear rate (in Btu/kWh)

SR = SO_2 rate for fuel (in lb SO_2/MMBtu)

30.09 Payments Made for Energy

(a) Each Company shall pay for energy allocated to it from a Designated Generating Unit as purchased energy the cost of fuel consumed per kWh.

(b) Each Company shall pay for energy received from the energy allocated in accordance with the provisions of Section 30.03(b) above, the weighted average cost per kWh of energy, as provided under Section 30.06(b) above, accumulated and distributed on a hourly basis.

(c) Each Company shall pay for energy received from the energy allocated in accordance with

the provisions of Section 30.06 above, the cost per kWh of energy as provided under Section 30.08(c) above, accumulated and distributed on a hourly basis.

30.10 Cost of Fuel Per kWh

Cost of fuel per kWh shall be determined for each generating unit by multiplying the BTU consumed per kWh of net generation during the preceding calendar year by the current estimated cost per BTU of the fuel used as furnished by each Company monthly. For the first year of operation of a new unit, BTU consumed per kWh of net generation shall be based on the design *heat rate at 60% of full load capability at anticipated average annual back pressure.

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* Typograhical correction. "eat" changed to "heat"

This Service Schedule MSS-3 shall be attached to and become a part of the Agreement dated the 23rd day of April, 1982 and shall be effective with said Agreement or at such later date as may be fixed by any requisite regulatory approval or acceptance for filing.

Attest ARKANSAS POWER & LIGHT COMPANY

Original signed by	Original signed by
R. J. Estrada	Jerry Maulden
Assistant Secretary	President

Attest LOUISIANA POWER & LIGHT COMPANY

Original signed by	Original signed by
W. H. Talbot	J. M. Wyatt
Secretary	President

Attest MISSISSIPPI POWER & LIGHT COMPANYS

Original signed by	Original signed by
R. J. Estrada	D. C. Lutken
Assistant Secretary	President

Attest NEW ORLEANS PUBLIC SERVICE INC.

Original signed by	Original signed by
William C. Nelson	James M. Cain
Secretary	President

* * * *

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No. 07-651

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ENTERGY CORPORATION, *et al.*,
Petitioners,

v.

DAVID JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the judgment below is final under 28 U.S.C. § 1257(a), when the Texas court of appeals, having determined that respondents may not challenge any wholesale rates or allocations under a tariff filed with the Federal Energy Regulatory Commission, remanded the case for further proceedings on the ground that respondents' state-law tort claims did not necessarily require such relief.

2. Whether, having determined that respondents may not challenge any wholesale rates or allocations under a tariff filed with the Federal Energy Regulatory Commission, the court of appeals properly concluded that the state courts could initially consider respondents' state-law tort claims insofar as they do not require such relief.

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IN THE

Supreme Court of the United States

No. 07-651

ENTERGY CORPORATION, *et al.*,
Petitioners,

v.

DAVID JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

The petition in this case arises out of petitioners' preliminary motion to dismiss respondents' complaint for lack of subject matter jurisdiction. The state district court granted the motion, agreeing with petitioners' two-pronged argument that respondents' state-law tort claims were within the exclusive jurisdiction of the Federal Energy Regulatory Commission or the Texas Public Utility Commission. The court of appeals reversed. Although the court of appeals agreed that federal law barred claims challenging the reasonableness of FERC-regulated wholesale rates, it found that respondents' claims were not so directed and remanded for further proceedings on the merits.

The Texas Supreme Court denied review without opinion.

1. Respondents are consumers of electric power in Texas. They brought this tort suit in state court on behalf of themselves and other consumers, alleging that petitioners, which are all participants in an integrated power pool, had committed various improper acts related to purchases of electric power in the wholesale market.[1] They sought relief solely under state law, alleging that petitioners, among other things, had engaged in an unlawful conspiracy and breached their fiduciary duties to respondents. Pet. App. 4a-5a. In addition, respondents claimed that petitioners' activities violated the Texas Theft Liability Act. *Id.*; *see* Texas Civ. Prac. & Rem. Code Ann. § 134.001 *et seq.*

The allegations of the complaint fell into two main categories. First, respondents alleged that petitioners had engaged in various schemes "for the intended purpose of forcing Defendants' and [Entergy Gulf States'] customers (and the customers of other Operating Companies) to purchase more power from the Entergy System Pool than they should have, rather than using cheaper power available from non-Entergy companies." Plaintiffs' First Amended Original Petition, ¶26 (Tex. S. Ct. Petition for Review,

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[1] Petitioners are the Entergy Corporation; Entergy Services, Inc.; Entergy Power, Inc.; Entergy Power Marketing Corp.; Entergy Arkansas, Inc.; and Entergy Gulf States, Inc. Respondents did not name Entergy Gulf States as a defendant, but the state district court granted Entergy Gulf States' motion to intervene over respondents' objection, and the court of appeals affirmed that ruling. Pet. App. 14a-16a. For simplicity, we use the term "petitioners" as though Entergy Gulf States had been a defendant from the outset of the litigation.

App. E). Second, respondents asserted that "Defendants' and [Entergy Gulf States'] after-the-fact accounting methods and computer programs have hidden and encouraged the improper purchasing decisions that resulted in Defendants' and [Entergy Gulf States'] customers paying more for power than they should have to the benefit of Defendants." *Id.*, ¶26. With respect to the latter claim, respondents alleged that "Defendants have intentionally understated the incremental costs [of power generation] in order to hide the excessive costs of their electric power purchases from themselves and affiliates and to hinder, frustrate, delay and/or avoid regulatory review of the reasonableness of their power purchases." *Id.*, ¶29.

Petitioners sought unsuccessfully to remove the case to federal court. *See Jenkins v. Entergy Corp.*, C.A. No. G-03-746 (S.D. Tex. 2004) (Tex. S. Ct. Response to Petition for Review, App. C). In granting respondents' motion to remand, the federal district court critically reviewed the allegations of the complaint, noting that respondents had challenged both petitioners' purchasing decisions at the wholesale level and their utilization of "creative accounting techniques to show that the high-cost power was sold to Texas residents when in fact it was not." Order at 2. The district court then concluded that, based on the claims as set forth in the complaint, petitioners had not established a proper basis for removal, rejecting their argument that respondents' claims "ultimately rest[ ] on whether or not the System Agreement, a FERC-approved tariff, was violated." Order at 4. Stating that "a violation of the tariff is not an essential element to any of [respondents'] claims," Order at 5, the court pointed out that respondents "can conceivably prove their state-law claims

by providing evidence that [petitioners] used fraudulent accounting techniques to overcharge customers." Order at 5.[2]

Back in state court, petitioners moved to dismiss the case for lack of subject matter jurisdiction, making many of the same tariff-based arguments that they had made before the federal court, but adding the additional argument that the Texas Public Utilities Commission had exclusive jurisdiction as well. The state district court granted the motion. Pet. App. 40a-41a. The court construed the complaint to "address[ ] matters governed by the Entergy System Agreement," Pet. App. 38a, and to assert damage claims based on the "difference between the price paid by [respondents] for electric service from [Entergy Gulf States] and the price they would have paid if available lower-priced power had been allocated to [Entergy Gulf States]." Pet. App. 38a. Then, based on that interpretation, the court determined that it had no jurisdiction over respondents' claims, finding that "FERC possesses exclusive jurisdiction over interpretation, violations, enforcement, and amendment of federal electric tariffs, and court actions (except for judicial review of FERC decisions) complaining of actions taken and decisions made under approved federal tariffs are preempted." Pet. App. 38a. The district court also concluded that the Texas Public Utility Commission had exclusive jurisdiction over the relief that respondents sought. Pet. App. 38a-39a.

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[2] The federal district court also found that there was no basis for finding "complete preemption" in this case. Order at 4 n.1. It noted that "[b]oth Parties" had agreed that complete preemption was inapplicable. *Id.*

2. The Texas court of appeals reversed. As an initial matter, the court of appeals found that the Texas Public Utility Commission had neither exclusive nor primary jurisdiction over the claims for relief. The court noted that "wholesale rates are subject exclusively to federal regulation," Pet. App. 20a, and that "the PUC cannot consider purchasing, selling or allocation decisions involving wholesale power sales where those decisions are made on an interstate basis between various companies." Pet. App. 23a. It also found that "the suit before us is inherently judicial in nature, in which Jenkins brings state law tort claims based on those interstate purchasing and allocation decisions." Pet. App. 23a.

The court of appeals turned next to the question whether FERC had exclusive jurisdiction over respondents' claims. The court recognized that "FERC has the 'exclusive authority to determine the reasonableness of wholesale [electricity] rates' under the Federal Power Act." Pet. App. 24a, quoting *Official Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Co.*, 378 F.3d 511, 518 (5th Cir. 2004). It further acknowledged that "[u]nder the filed rate doctrine, 'the reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts,'" Pet. App. 24a-25a, quoting *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 375 (1988), and that "district courts are preempted from awarding breach of contract damage awards calculated using a rate other than the rate filed with FERC." Pet. App. 25a. The court added that "[m]any aspects of the interstate 'transmission' or 'sale' of wholesale energy pursuant to a federal tariff, and not merely matters involving rates, fall within FERC's exclusive jurisdiction." Pet. App. 25a. It thus observed that "[w]hether FERC has

exclusive jurisdiction under the Federal Power Act is . . . a close question dependent upon what exactly is in issue." Pet. App. 27a.

Against this background, the court of appeals considered whether, based on the record before it, respondents' claims fell within the field of exclusive FERC jurisdiction. Of particular importance here, the court expressly "agree[d] that the filed rate doctrine bars a claim that would require this Court to measure the difference between the allegedly fixed wholesale price and an otherwise 'just and reasonable wholesale price,' regardless of whether the claim itself is couched in state law terms." Pet. App. 32a. The court cited with approval *In re California Wholesale Electricity Antitrust Litigation*, 244 F. Supp.2d 1072, 1077 (S.D. Cal. 2003), *aff'd sub nom. Public Utility District No. 1 of Snohomish County v. Dynegy Power Mktg., Inc*, 384 F.3d 756 (9th Cir. 2004), where the federal court had rejected claims in which "the plaintiffs . . . sought as redress the difference between the charged rates and the different, hypothetical rates they believed would have 'been achieved in a competitive market.'" Pet. App. 33a, quoting *California Wholesale Electricity*, 244 F. Supp.2d at 1077. Nevertheless, while the Texas court of appeals acknowledged that claims seeking to question FERC-approved rates were within FERC's exclusive jurisdiction, it disagreed with the district court regarding whether respondents' allegations were dependent on such re-examination, finding that "this is not the measure of damage pursued by [respondents]." Pet. App. 32a; *id.* at 33a ("[s]uch is not the case here"). The court stated that respondents do "not challenge the rates or the FERC-approved formulas, but instead the discretionary decisions that directed who

would benefit from the cheaper power." Pet. App. 33a.[3]

Relying on FERC's own pronouncements, the court of appeals also observed "that FERC jurisdiction is not exclusive or preemptive in all circumstances." Pet. App. 27a. It quoted from a recent FERC order stating that "'the Commission's jurisdiction to consider disputes arising under jurisdictional tariffs does not as a matter of law preclude state courts from also entertaining such disputes in the appropriate circumstances.'" Pet. App. 28a, quoting Order No. 888-B, 81 FERC ¶ 61,248, at 62,081 (1997). To determine whether the circumstances were appropriate here, the court of appeals then looked to the three-part test that the Commission uses for determining whether it should assert jurisdiction over certain tariff disputes. *See* Pet. App. 28a, citing *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979); note 12 *infra* (quoting test). The court noted that FERC had not specifically passed on the propriety of petitioners' purchasing decisions, Pet. App. 32a, 34a, and it "interpret[ed] the discretionary decisions in issue as being the type that do not impact or impair FERC's flexibility in approving cost-allocation arrangements." Pet. App. 32a. It thus concluded that the district court had erred in summarily dismissing the suit for lack of jurisdiction, and "remand[ed] for further proceedings." Pet. App. 36a. It recognized, however, that "FERC jurisdiction could potentially expand to encompass this dispute . . . ." Pet. App. 36a.

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[3] At the same time, the court acknowledged that "FERC-mandated allocations cannot be challenged except before FERC, and neither can discretionary decisions that would impact or impair FERC's flexibility in approving cost-allocation arrangements." Pet. App. 30a.

Petitioners sought review in the Texas Supreme Court, which called for full briefing on the questions raised in the petition. After reviewing the submissions, the Supreme Court denied the petition, *see* Pet. App. 1a, and subsequently denied a petition for rehearing as well. *See* Pet. App. 42a-43a.

ARGUMENT

Further review of this case would be both premature and unwarranted. It would be premature because the decision of the Texas court of appeals is an interlocutory one—deciding only that, based on the limited record before it, the state courts may exercise at least some jurisdiction over respondents' claims—and because none of the recognized grounds for treating interlocutory orders as final are present here. *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 482 (1975); pages 9-11 and 24-25 *infra*. It would be unwarranted because, contrary to petitioners' central assertion, the court of appeals did *not* hold that Texas courts may second-guess the reasonableness of rates subject to FERC oversight, but decided just the opposite: "that the filed rate doctrine *bars a claim* that would require this Court to measure the difference between the allegedly fixed wholesale price and an otherwise 'just and reasonable wholesale price,' regardless of whether the claim itself is couched in state law terms." Pet. App. 32a (emphasis added). Far from disagreeing with numerous decisions of this Court and other federal and state courts, the Texas court of appeals explicitly aligned itself with the governing principles set forth in those cases, holding only that respondents' claims did not necessarily trespass into the forbidden category. *See* pages 11-18 *infra*. What the Texas courts have held so far, therefore, is that—once it is accepted that litigants are

not permitted to question FERC-approved rates—the Commission, by its own admission, does not have exclusive jurisdiction over all "disputes arising under jurisdictional tariffs," Order 888-B, 81 FERC ¶ 61,248, at 62,081 (1997), and that, given the particular nature of the dispute in this case, state courts can proceed to consider the state-law claims (and any more specific preemption arguments) in the first instance. *See* pages 18-24 *infra*. That ruling is not worthy of review at this point, and the petition should be denied.

1. The express terms of 28 U.S.C. § 1257(a) establish that this Court has jurisdiction to review only "[f]inal judgments or decrees" from state courts. *See Jefferson v. City of Tarrant*, 522 U.S. 75 (1997); *Johnson v. California*, 541 U.S. 428 (2004). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *City of Tarrant*, 522 U.S. at 81, quoting *Market Street R. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551 (1945). Here, the decision below is, by its nature, interlocutory: the Texas court of appeals decided only that the trial court should have denied petitioners' motion to dismiss for lack of jurisdiction, and it remanded the case for further proceedings on the merits. Under the usual standards, that is not a "final" judgment. *See, e.g., O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) ("[b]ecause the Colorado Supreme Court . . . remanded this case for trial, its decision is not final 'as an effective determination of the litigation'") (quoting *Market Street R. Co.*, 324 U.S. at 551).

To establish finality, petitioners rely, in part, on the well-known decision in *Cox Broadcasting*, which held that interlocutory judgments can be considered final for purposes of 28 U.S.C. § 1257(a) in certain limited circumstances. *See* Pet. 13; *Cox Broadcasting*, 420 U.S. at 476-85.[4] Although petitioners do not identify the particular *Cox Broadcasting* exception that they intend to invoke, the only plausible candidate appears to be the fourth exception, which requires, among other things, a showing that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and a further showing that "a refusal immediately to review the state-court decision might seriously erode federal policy." 420 U.S. at 482-83.[5] But petitioners cannot meet either of those require-

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[4] Petitioners also rely on *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), which applied *Cox Broadcasting* to a decision of the Mississippi Supreme Court reviewing an order of the Mississippi Public Service Commission. We discuss that case, and its bearing on finality here, at page 14 and note 7 *infra*.

[5] This Court in *Cox Broadcasting* noted that it had reviewed judgments from state courts, *inter alia*, in "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-83.

ments. As we discuss below, petitioners' arguments for "litigation-precluding" preemption depend, for the most part, on a plain misreading of the court of appeals' decision, which actually agreed with petitioners on their primary preemption argument but nonetheless determined that further proceedings were appropriate. Moreover, read properly, that decision reveals that the Texas courts did not flout "federal policy" but instead went to considerable lengths to respect and accommodate FERC authority, relying upon a jurisdictional inquiry formulated by FERC itself. There is thus no need for review by this Court, much less "immediate[ ]" review.

2. The petition in this case has a dominant theme: that the Texas court of appeals has authorized Texas juries to second-guess the FERC-regulated wholesale rates charged by petitioners and to award damages based on the difference between those rates and hypothetical "reasonable" rates (that is, rates recalculated to eliminate the effects of petitioners' wrongdoing under state law). Thus, the "Question Presented" asks whether "a state court may determine that the bulk power supply arrangements of an interstate power pool governed by a FERC tariff violate state tort law and may award retail customers damages based on what their electricity rates would have been if the interstate power pool operated in the manner that the state court jury finds prudent." Pet. (i). Later, petitioners criticize the court of appeals for holding, among other things, "that a state court may order the Entergy System to pay EGSI's retail ratepayers the full amount of whatever portion of the[ ] wholesale charges are found excessive by a jury." *See* Pet. 17. Proceeding from this re-characterization, petitioners argue at length that the decision below is

in conflict with numerous cases from this Court and other federal and state courts. Pet. 17-27.

Petitioners' reading of the court of appeals' holding, however, is demonstrably incorrect. Instead of allowing respondents to challenge the reasonableness of FERC-regulated rates, the court of appeals expressly held that respondents could *not* do so: "the filed rate doctrine bars a claim that would require this Court to measure the difference between the allegedly fixed wholesale price and an otherwise 'just and reasonable wholesale price,' regardless of whether the claim itself is couched in state law terms." Pet. App. 32a; *see also* Pet. App. 24a-25a ("[u]nder the filed rate doctrine, 'the reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts,'" quoting *Mississippi Power & Light*, 487 U.S. at 375). In reaching this conclusion—which is not quoted anywhere in the petition—the court below cited to, and specifically relied on, a recent federal case that had found preemption of just such claims. *See* Pet. App. 32a, citing *In re California Wholesale Electricity Antitrust Litigation*, 244 F. Supp. 2d 1072, 1078 (S.D. Cal. 2003), *aff'd sub nom. Public Utility Dist. No. 1 of Snohomish County v. Dynergy Power Mktg, Inc.*, 384 F.3d 756 (9th Cir. 2004). Noting that the plaintiffs in *California Wholesale Electricity* had "sought as redress the difference between the charged rates and the different, hypothetical rates they believed would have 'been achieved in a competitive market,'" Pet. App. 33a, the Texas court of appeals recognized that, "[b]ecause the court would be 'expressly required to assume a hypothetical rate different from that actually set by FERC,' FERC jurisdiction prevailed." Pet. App. 33a, quoting *California Wholesale Electricity*, 244 F. Supp. 2d at 1077 (some internal quotation marks omitted). The

court distinguished that decision, not because it disagreed with the governing legal principle, but because it found that the claims in this case were of a different nature. *See* Pet. App. 33a ("[s]uch is not the case here"); *see also* Pet. App. 32a ("this is not the measure of damage pursued by Jenkins").

The legal analysis of the Texas court of appeals is thus in line with, rather than in conflict with, the numerous cited decisions of this Court and other federal and state courts. *See* Pet. 17-27. Those cases, like the decision below, stand for the established principle that neither state utility commissions nor plaintiffs asserting state-law claims may seek to substitute a new, "reasonable" wholesale rate for the rate contained in a FERC-approved tariff, or attempt to alter the allocations of power set forth in such a tariff.[6] For example, in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003), the case on which petitioners most heavily rely, this Court held that the Louisiana Public Service Commission, in setting retail rates, could not disallow certain tariff-based costs that were passed through to the retail utility by a wholesale seller. The Court noted that "[t]he filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates,'" 539 U.S. at 47, quoting *Nantahala Power & Light Co.*

[6] In addition to its statement with respect to rates, the Texas court of appeals declared that respondents could not challenge allocations made to Entergy Gulf States under the System Agreement. *See* Pet App. 30a. The court remarked that "[c]learly, FERC-mandated allocations cannot be challenged except before FERC, and neither can discretionary decisions that would impact or impair FERC's flexibility in approving cost-allocation arrangements." *Id.*

v. Thornburg, 476 U.S. 953, 962 (1986), and it rejected the idea that state commissions could effectively posit a different, lower wholesale rate for the purposes of determining allowable costs at the retail level. *See* 539 U.S. at 49-50.

The earlier decisions in *Mississippi Power & Light* and *Nantahala Power and Light* rested upon the same basic notion. In *Nantahala Power & Light*, the Court overturned a decision of the North Carolina Supreme Court that had allowed state regulators to deny recovery of certain costs incurred at the wholesale level and passed through to the retail seller, stating plainly that "[w]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . Such a 'trapping' of costs is prohibited." 476 U.S. at 970. *See also id.* at 971 (state commission order would impermissibly require utility to "calculate its retail rates as if it received more [low-cost] entitlement power then it does under FERC's order"). Similarly, in *Mississippi Power & Light*, the Court held that the Mississippi Public Service Commission could not partially disallow recovery of the designated wholesale rate on the basis that it reflected an imprudent assumption of costs by the wholesale seller. Relying on *Nantahala Power & Light*, the Court declared that "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." 487 U.S. at 371.[7]

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[7] The preemption argument in *Mississippi Power & Light*, once adopted by this Court, necessarily meant that the Public

The Ninth Circuit cases relied on by petitioners are similar. Indeed, petitioners themselves describe the "conflicting" Ninth Circuit cases as holding that the Federal Power Act "preempts state law claims that wholesale costs incurred under FERC rate schedules were artificially inflated and that seek to recover the difference between those costs and the lower costs that would have been incurred if the utilities had complied with the purported state law standards." Pet. 24, citing *Public Utility District No. 1 v. Dynergy Power Mktg., Inc.*, 384 F.3d 756, 760-62 (9th Cir. 2004); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831. 851-53 (9th Cir. 2004), *amended by* 387 F.3d 966 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005). Thus, in *Public Utility District No. 1*, the Ninth Circuit expressly noted that the plaintiff's claims "ask[ed] the district court to determine the rates that 'would have been achieved in a competitive market,'" 384 F.3d at 761, relief that the court found to be "barred by the filed rate doctrine, by field preemption, and by conflict preemption." *Id.*[8] In *California ex rel. Lockyer*, while the plaintiff did not

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Service Commission's attempt to redefine wholesale costs was foreclosed, thus satisfying the fourth *Cox Broadcasting* exception. *See* pages 10-11 *supra*. By contrast, the decision below held that, *even accepting* petitioners' preemption argument with respect to the impermissibility of recalculating wholesale costs, the state courts had jurisdiction to consider respondents' claims to the extent that they did not require such prohibited relief. *See* Pet. App. 32a-33a.

[8] As we have noted, the Texas court of appeals—in holding that the filed rate doctrine bars claims based on an alleged difference between FERC-approved tariff rates and a hypothetical "reasonable" rate, *see* Pet. App. 32a—specifically relied on the district court decision in *California Wholesale Electricity*, which the Ninth Circuit then affirmed in *Public Utility District No. 1*.

seek to revise a wholesale rate, it did seek to modify a FERC-approved tariff by adding remedies for breach that were over and above those expressly set out in the tariff itself. The Ninth Circuit found that the "California claims are preempted because they encroach upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy." 375 F.3d at 852.

The remaining cases from federal courts of appeals and state supreme courts, to the extent relevant at all,[9] likewise acknowledge the inappropriateness of basing damages, or recalibrating retail rates, on a second-guessing of FERC-established tariff obligations. In *Appalachian Power Co. v. Arkansas Pub. Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987), the court of appeals held that States may not "exert authority that potentially conflicts with FERC determinations regarding rates or agreements affecting rates." 812 F.2d at 904. In *Transmission Agency v. Sierra Pac. Power Co.*, 295 F.3d 918 (9th Cir. 2002), the Ninth Circuit noted that neither state nor federal courts could "assume[ ] a hypothetical rate different from

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[9] Two of the federal cases—*South Dakota Pub. Utils. Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982), and *Anaheim, Cal. v. FERC*, 669 F.2d 799 (D.C. Cir. 1981)—are direct appeals from FERC orders and do not address questions about the concurrent jurisdiction of state courts. A third case—*Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985)—held that state discrimination against out-of-state sellers is barred by the negative Commerce Clause, a holding that has little relation to the issues here. And, in *Public Serv. Co. v. Patch*, 167 F.3d 15 (1st Cir. 1998), the First Circuit agreed that a state commission could review the prudency of purchases by retail utilities—so long as the utility had a choice of suppliers—but found that no such issue had been raised in that case. *See* 167 F.3d at 27.

that actually set by FERC," 295 F.3d at 930, ultimately concluding that it could not reassess a FERC decision regarding power allocation. And the state cases uniformly reject attempts by state utility commissions to disregard tariffed wholesale rates or FERC-approved allocations in setting retail rates. *See, e.g., General Motors Corp. v. Illinois Commerce Comm'n*, 574 N.E.2d 650, 658 (Ill. 1991) ("the filed rate doctrine prohibits State prudence review of FERC-mandated costs"); *Eastern Edison Co. v. Dept. of Pub. Utils.*, 446 N.E.2d 684, 690 (Mass. 1983) ("the Federal Power Act precludes [state] review of the reasonableness of the [wholesale seller's] rate"); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) (state commission cannot inquire into "reasonableness of [wholesale] rates as an operating expense").[10]

Like those state and federal courts, the court of appeals below was fully cognizant of, and expressly agreed with, the principle that respondents could not question the FERC-regulated tariff rates or the allocations made to Entergy Gulf States. Its disagreement with petitioners rested on a quite different issue: whether it was clear, on the basis of the record, that all of respondents' claims depended on that kind of inquiry. Pet. App. 32a-33a. Although the complaint refers to inflated costs at the wholesale level, it also makes allegations about the misuse of computer

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[10] *See also Maine Yankee Atomic Power Co. v. Maine Pub. Utils. Comm'n*, 581 A.2d 799, 804 (Me. 1990) (state agency "has no authority to require a reduction in a component of [retail utility's] rates, set exclusively by FERC"); *Northern States Power Co. v. Minnesota Pub. Utils. Comm'n*, 344 N.W.2d 374, 382 (Minn. 1984) ("the state utilities commission is required to treat the [FERC-] allocated abandonment costs as expenses for power purchased in determining the retail rates").

programs and improper concealment of actual costs, activities that are themselves unlawful under state law. *See* Plaintiffs' First Amended Original Petition, ¶¶ 26, 29; *see also Jenkins v. Entergy Corp.*, C.A. No. G-03-746 (S.D. Tex. 2004) (remand Order) at 5 (respondents "can conceivably prove their state-law claims by providing evidence that [petitioners] used fraudulent accounting techniques to overcharge customers"). Furthermore, the kinds of relief sought by respondents would not necessarily require that state courts measure damages by calculating the spread between the tariff rate and a rate free from the effects of tortious behavior. For example, respondents have sought relief under the Texas Theft Liability Act, which provides for statutory damages up to $1,000. *See id.*, ¶¶ 34-36; Tex. Civ. Prac. & Rem. Code Ann. §134.005(a)(1). Given the narrow scope of the issues raised by the motion to dismiss, the Texas court of appeals did not pass on the validity of those claims as a matter of state law, leaving them to be addressed in the first instance on remand. *See* Pet. App. 36a. If petitioners believe that their preemption arguments call for additional limits on respondents' claims, those questions are best considered after the lower courts have more fully addressed the precise nature of those claims and remedies.

3. Petitioners also make the broad suggestion that all aspects of their purchasing decisions—including, apparently, any improper computer or bookkeeping operations—are within the terms of the System Agreement and, as a consequence, are subject only to FERC's jurisdiction. *See* Pet. 6-8, 21. Here again, the Texas court of appeals explicitly acknowledged that FERC has extensive authority over issues that may arise under FERC tariffs. *See* Pet. App. 25a-

27a. The court pointed out that "[m]any aspects of the interstate 'transmission' or 'sale' of wholesale energy pursuant to a federal tariff, and not merely matters involving rates, fall within FERC's exclusive jurisdiction." Pet. App. 25a, citing *California ex rel. Lockyer*, 375 F.3d at 851. Likewise, it observed that "the filed rate doctrine is not limited 'to rates per se or FERC orders that deal in terms of prices or volumes or purchases.'" Pet. App. 25a, quoting *California ex rel. Lockyer*, 375 F.3d at 851.

The court of appeals correctly noted, however, that FERC does not have—or even claim to have—exclusive jurisdiction over *all* matters that may be related to tariffed activities at the wholesale level. Pet. App. 27a. FERC itself has said that "the Commission's jurisdiction to consider disputes arising under jurisdictional tariffs does not as a matter of law preclude state courts from also entertaining such disputes in the appropriate circumstances." Order 888-B, 81 FERC ¶ 61,248, at 62,081 (1997); *Portland General Electric Co.*, 72 FERC ¶ 61,009, at 61,021 (1995); *see also* Pet. App. 27a ("[w]hether FERC has exclusive jurisdiction under the Federal Power Act is . . . a close question dependent upon what exactly is in issue"). FERC orders likewise have recognized that the "field" of the Commission's exclusive jurisdiction does not extend to every question that might bear on how tariff-related activities are conducted. For example, FERC recently declined to exercise jurisdiction over a contractual dispute between a wholesale seller and buyer, stating that "because [the buyer's] complaint 'only seeks enforcement of an existing contract, and not the setting of a new just and reasonable rate,' the case 'does not fall within the Commission's exclusive jurisdiction.'" *Water and Power Department of the City of Glendale, California*

v. Portland General Electric Co., 113 FERC ¶ 61,285, at 62,153 (2005), quoting *Kentucky Utilities*, 110 FERC ¶ 61,285, at 62,101 (2005).[11] *See California Department of Water Resources*, 121 FERC ¶ 61,191, at PP 44-45 (2007); *Constellation Energy Commodities Group, Inc.*, 119 FERC ¶ 61,292, at P. 22 (2007); *see also Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961); *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471-72 (5th Cir. 1987).

To determine whether it will exercise jurisdiction over tariff-related matters, FERC has traditionally relied upon a three-part test set forth in *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979).[12] As the court below pointed out, *see* Pet. App. 28a, that test not only raises questions about the need for agency expertise and uniformity, *see id.*, but also looks to "whether the case is important in relation to the regulatory responsibilities of FERC." *Id.* It is self-evident that FERC could not resolve every dispute that arises under the myriad of federal tariffs filed before it, or that somehow might bear on

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[11] Respondents' complaint does not make any claims based upon "textual violations of the System Agreement." *See* Pet. App. 33a. Petitioners have raised the terms of the System Agreement, however, as part of their preemption defense.

[12] The Commission stated that "[w]hether the Commission should assert jurisdiction over contractual issues otherwise litigatable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission." *Ark. La. Gas Co.*, 7 FERC ¶ 61,175, at 61,322.

activities contemplated under those tariffs, and it is also clear that, so long as their scrutiny does not interfere with primary federal authority, states have a legitimate interest in applying their own laws. *See* Order 888-B, 81 FERC ¶ 61,248, at 62,081 (acknowledging "the possibility that tribunals other than the Commission may be called upon to adjudicate disputes arising from service under the tariff"); *see generally New York v. FERC*, 535 U.S. 1, 28 (2002) (upholding FERC decision not to exercise exclusive jurisdiction over "the transmission component of a bundled retail sale" in light of "the complicated nature of the jurisdictional issues"). Thus, the Commission typically has chosen to exercise its non-exclusive jurisdiction only where its oversight is important to the federal regulatory scheme. *See, e.g.*, *California Department of Water Resources*, 121 FERC ¶ 61,191, at P. 45.

The court of appeals below, in trying to weigh the possible effects of state jurisdiction upon the authority granted to the Commission, used the Commission's own test as a framework for determining whether the Texas courts could address respondents' claims. It ultimately concluded that adjudication of the claims at issue—provided that they were construed not to seek a recalculation of wholesale rates—would "not impact or impair FERC's flexibility in approving cost-allocation arrangements." Pet. App. 32a. The court of appeals pointed out that respondents do not challenge *sales* by petitioners at the wholesale level, or the rates at which those sales were made, but rather antecedent discretionary decisions about scheduling the *purchase* of electric power, as well as the use of computer programs and accounting practices to mask the real effects of those transactions. *See* Pet. App. 31a-32a. It reasoned

that, so long as respondents were not permitted to question the subsequent rates, consideration of respondents' claims would not interfere with FERC's ability to exercise control over exclusively federal issues. *See id.*

The supposedly contrary FERC decisions cited by petitioners (Pet. 21 n.6) actually support this conclusion. *See Portland General Electric*, 72 FERC ¶ 61,009, at 61,021; *Northern States Power Co. v. Southern Minnesota Municipal Power Agency*, 55 FERC ¶ 61,101, at 61,343-44 (1991); *Southern Co. Services, Inc.*, 37 FERC ¶ 61,256, at 61,652 (1986). In those decisions, the Commission made clear, *first*, that it "has exclusive jurisdiction to determine the reasonableness of rates for the sale of electricity at wholesale in interstate commerce by public utilities . . .," *Portland General Electric*, 72 FERC ¶ 61,009, at 61,020; *see Northern States Power*, 55 FERC ¶ 61,101, at 61,343 n.5; *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652, and, *second*, that "[w]ith respect to breach of contract claims arising under state law, the Commission does not possess exclusive jurisdiction." *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652; *see Portland General Electric*, 72 FERC ¶ 61,009, at 61,021. As a result, whereas the Commission went on to exercise its exclusive jurisdiction over a claim that "would require the Commission to reform the contracts in order for the contracts to be just and reasonable," *Northern States Power*, 55 FERC ¶ 61,101, at 61,344, and over certain claims that "touch upon the reasonableness of the rates under agreements that are subject to our jurisdiction," *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652, it *declined* to exercise jurisdiction over tariff matters that did not immediately bear on the reasonableness of FERC-regulated rates or conditions.

See Portland General Electric, 72 FERC ¶ 61,009, at 61,021 ("[t]he complaint in state court does not challenge the reasonableness of [the utility's] rates under the Power Agreement, or any term and condition of service"); *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652 ("[w]ith respect to Gulf States' allegation that the Southern Companies have not acted in good faith, the question is not one which appears to implicate technical expertise, nor is it one which is central to our regulatory responsibilities"). Here, of course, the Texas court of appeals has already made the determination that respondents' claims do not—indeed, under the filed rate doctrine, cannot—attack the reasonableness of the rates charged by petitioners at the wholesale level. *See* Pet. App. 32a-33a.[13]

Petitioners do not argue that the court of appeals misapplied the *Hall* test (they do not mention the test at all), nor did they do so before the Texas Supreme Court. And, in any event, that question is of no general importance: the conclusion reached by the Texas court of appeals is not binding on the Commission, and the Commission is free to assert jurisdiction over the subject matter of respondents' claims if it wants to do so. The Texas court of appeals, in fact, expressly acknowledged that possibility, pointing out that, despite its ultimate decision that the state courts had jurisdiction to consider the claims in this action, "FERC jurisdiction could potentially expand

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[13] Although this case does not directly involve claims of tariff violation, *see* note 11 *supra*, state courts may also have concurrent jurisdiction to consider whether wholesale sellers have failed to comply with the terms of their tariffs. In *Entergy Louisiana*, this Court did not "address the question of the exclusivity of FERC's jurisdiction to determine whether and when a filed rate has been violated," 539 U.S. at 51, finding that it had not been presented on the record in that case. *Id.*

to encompass this dispute . . . ." Pet. App. 36a. Thus, it appears that, if petitioners were to seek a FERC determination that respondents' complaint raises matters within its jurisdiction, and FERC decided to address those questions, state court jurisdiction might ultimately give way.

4. There is nothing in the decision below, therefore, to indicate that, absent "immediate[ ]" review, federal policy will be "seriously erode[d]." *Cox Broadcasting*, 420 U.S. at 483. At this intermediate stage of the litigation, petitioners have at least two potential avenues open to them. They may press their state and federal arguments on remand, including arguments that particular claims or forms of relief have been limited by the ruling below. Or, if they choose, they may seek to file a petition with the Commission, asking it to determine whether it should exercise jurisdiction over the activities at issue in the lawsuit. Given those options, interlocutory review by this Court is neither necessary nor justified.

The final judgment requirement is "not one of those technicalities to be easily scorned." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Rather, "[i]t is an important factor in the smooth working of our federal system." *Id.* *See also Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (rule "prevent[s] our interference with state proceedings when the underlying dispute may be otherwise resolved"). As this Court has said: "The finality requirement of 28 U.S.C. § 1257 . . . serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a bare mini-

mum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). As a result, "[c]ompliance with the provisions of § 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section." *Johnson*, 541 U.S. at 431.

"A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment." *Id.* Here, although petitioners have made sweeping claims of preemption, the crux of their claims to "field" preemption—that the Texas courts have allowed the second-guessing of FERC wholesale rates—rests upon a patent misreading of the decision below. Yet, read correctly, the court of appeals' opinion amounts to no more than a preliminary determination that, at this stage of the litigation and in the absence of any action by FERC, the state courts may assert initial jurisdiction over respondents' tort claims without impairing the exercise of FERC's paramount authority over wholesale rates and practices. That narrow ruling does not pose an imminent threat to "federal policy," *Cox Broadcasting*, 420 U.S. at 483, and the petition does not merit review at this stage.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

CONVOLVE, INC. AND
MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Petitioners,

v.

SEAGATE TECHNOLOGY, LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF

PRELIMINARY STATEMENT

The Federal Circuit *sua sponte* ordered *en banc* mandamus review and changed the law governing increased-damages awards under 35 U.S.C. § 284. The *en banc* decision, with its nationwide application, rewrote § 284 to deprive district courts of their statutory discretion, and it split with the other circuits by depriving district courts of discretion to determine the scope-of-waiver accompanying advice-of-counsel defenses. This Court should grant certiorari to give § 284 its proper interpretation and restore the district courts' discretion to enhance damages and define the scope-of-waiver. None of

respondent's arguments for avoiding immediate review stands in the way of reaching these important, recurring issues of nationwide significance. Because the Federal Circuit should not be the court of last resort on the important questions presented, certiorari should be granted.

I. THE IMPORTANT AND RECURRING QUESTIONS PRESENTED WARRANT IMMEDIATE REVIEW.

Each question presented in the petition was "'pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

- On the first question, the Federal Circuit erroneously held that its "well-established standard" for § 284 increased damages "requires a showing of willful infringement." Pet. App. 11a; Opp. 1, 10, 14 (acknowledging that the Federal Circuit "requires" willfulness to increase damages). The *en banc* concurrence supported "eliminat[ing] the grafting of willfulness onto section 284." Pet. App. 28a.
- On the second question, the Federal Circuit erroneously applied a *per se* rule foreclosing patentees who do not seek or obtain preliminary injunctions from "accru[ing] enhanced damages based solely on the infringer's post-filing conduct." *Id.*, at 22a.
- On the third question, the Federal Circuit erroneously "shield[ed] trial counsel from the waiver stemming from an advice of counsel defense to willfulness" based on post-litigation opinions. *Id.*, at 23a, 26a.

Sua sponte en banc mandamus review by an appellate court of nationwide jurisdiction, overturning

twenty-four years of precedent, judicially amending a statute, and creating special attorney-client privilege rules for patent litigation, is hardly the garden-variety "interlocutory discovery dispute[]" that respondent Seagate Technology LLC suggests. Opp. 9. Indeed, Seagate's own counsel has publicly touted (www.mwe.com) the *en banc* opinion as a "precedent-setting", "landmark decision" that "fundamentally rewrites the law of willful patent infringement."

There is an obvious, clear need for immediate, definitive guidance from this Court on a Federal Circuit *en banc* decision that is already dramatically impacting patent cases across the Nation.[1] *See Mesa* v. *California*, 489 U.S. 121, 124 (1989) (reviewing mandamus decree addressing statutory construction); *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 527-529 (1987) (reviewing mandamus decree involving discovery orders presenting important, recurring issues); *Kerr* v. *United States Dist. Court for N. Dist. of California*, 426 U.S. 394, 395-396, 401 n.4 (1976) (same effect); *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960) (affirming grant of mandamus on discovery issue of "great importance" "in a field of federal jurisdiction [admiralty] where nationwide uniformity

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[1] "[T]he [*Seagate*] standard" was controlling in *Innogenetics, N.V.* v. *Abbott Labs.*, 2008 U.S. App. LEXIS 976, at *43 (Fed. Cir. Jan. 17, 2008) (affirming JMOL of no willful infringement), and in, *inter alia*, *Se-Kure Controls, Inc.* v. *Diam USA, Inc.*, 2008 U.S. Dist. LEXIS 3988, at *4 (N.D. Ill. Jan. 17, 2008) (applying *Seagate*'s trial-counsel immunity rule); *Trading Techs. Int'l, Inc.* v. *eSpeed, Inc.*, 2008 U.S. Dist. LEXIS 295, at *4 (N.D. Ill. Jan. 3, 2008) (overturning willful infringement verdict); *Cohesive Techs., Inc.* v. *Waters Corp.*, 2007 U.S. Dist. LEXIS 69464, at **48-50 (D. Mass. Aug. 31, 2007) (denying increased damages).

has traditionally always been highly esteemed"); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384, 387 (1893) (*cited* at Opp. 11-12, 18, 23) (recognizing "the power and the duty of this court" to review "novel and important" interlocutory orders).

Seagate concedes that the willfulness doctrine, raised *sua sponte* in the *en banc* order, was "immaterial" and "not germane to the [waiver] issues" presented in its mandamus petition. Opp. 8-9, 12; *see also* Opp. 5 n.7 ("In their briefing in response to the *en banc* court's order, both Seagate and Convolve agreed that the third [*en banc*] question posed by the Federal Circuit [addressing willfulness] was unnecessary to resolve" Seagate's mandamus petition).[2] The Federal Circuit, however, "reject[ed] the argument that revisiting [its] willfulness doctrine is either improper or imprudent, as Convolve contends", finding that the issue was "'antecedent to . . . and ultimately dispositive'" of the dispute before it. Pet. App. 17a-18a (*quoting Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990)). Having thus injected its willfulness doctrine into the mandamus proceeding, the Federal Circuit then used the extraordinary writ to judicially amend § 284's increased-damages provision and to "'predetermin[e] . . . what the law shall be for the regulation of all future cases'" under that provision. *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring, citation omitted, defining "legislative act"). Contrary to Seagate's argument, improper use of an "interlocutory mandamus petition" cannot itself be grounds for

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[2] *See Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 88 n.9, 89 (1993) (certiorari granted where "both parties agree[d] that we should reject the Federal Circuit's practice").

creating an unreviewable decision. Opp. 12; *see also* Opp. 10, 15 (opposing certiorari on ground that the Federal Circuit decided issues "not necessary for resolution of Seagate's mandamus petition").

Seagate's separate challenge on standing grounds to the second question presented fares no better. Opp. 15-16. The Federal Circuit's *per se* rule forecloses patentees who do not seek or obtain preliminary injunctive relief from "accru[ing] enhanced damages based solely on the infringer's post-filing conduct." Pet. App. 22a. As Seagate points out, petitioner Convolve, Inc. "amended its complaint to add a . . . patent that issued during the pendency of the suit." Opp. 2. Reading the term "post-filing" to mean the original complaint, Seagate has contended in the district court that, "[b]ecause [this patent] was not added until after the original complaint was filed, Convolve's remedy for alleged willful infringement was a preliminary injunction, not enhanced patent damages," under the Federal Circuit's *per se* rule. District Court Docket No. 656, p. 3; *see* Pet. 27-28 (Seagate's construction renders the *per se* rule unconstitutional as applied). In opposing certiorari on standing grounds, Seagate fails to acknowledge its inconsistent district court position.

This Court "retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). The *en banc* decision, which rests on "amendment rather than construction of the statute . . . must be rejected. . . ." *Burlington N. R.R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987). The fact that the decision purports to govern all § 284 increased-damages cases is reason to grant certiorari,

not deny it as Seagate paradoxically suggests. Opp. 8-11, 15-18.

II. SECTION 284'S INCREASED-DAMAGES PROVISION SHOULD BE RESTORED TO ITS PROPER CONSTRUCTION.

"'We start, as always, with the language of the statute.'" *Knight* v. *Commissioner*, 128 S. Ct. 782, 787 (2008) (citation omitted). Under § 284, "the court may increase the damages up to three times the amount found or assessed" for patent infringement. 35 U.S.C. § 284. "The word 'may' clearly connotes discretion." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (*quoting Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

The Federal Circuit was "not at liberty to rewrite the statute to reflect a meaning [it] deem[ed] more desirable." *Ali* v. *Federal Bureau of Prisons*, No. 06-9130, *slip op.* at 14 (U.S. Jan. 22, 2008) (footnote omitted). The terms "willful infringement" and "punitive damages" are not found in § 284, and the statutory damages cap is the only limitation on the district court's statutory discretion. The Federal Circuit's construction of § 284 thus improperly "'depends upon the addition of words to a statutory provision which is complete as it stands.'" *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 128 S. Ct. 467, 474 (2007) (citation omitted).

"When Congress wished to limit an element of recovery in a patent infringement action, it said so explicitly." *GM Corp.* v. *Devex Corp.*, 461 U.S. 648, 653 (1983) (referencing 35 U.S.C. § 285's limitation

of attorney's fee awards to "exceptional cases"). Congress neither confined § 284 increased-damage awards to willful infringement (or even "exceptional cases") nor characterized the statutory multiplier as "punitive." As this Court has stated time and again: "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005); *accord Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citation omitted).

In a futile effort to circumvent *Devex*, Seagate incorrectly equates § 284's statutory multiplier with punitive damages to argue that "the Federal Circuit's willfulness rule is entirely consistent with the punitive purpose" Seagate ascribes to the statute. Opp. 14. Statutory "[t]reble damages certainly do not equate with classic punitive damages"; rather, such statutory multipliers "have a compensatory side, serving remedial purposes in addition to punitive objectives." *Cook County, Illinois* v. *United States ex rel. Chandler*, 538 U.S. 119, 130, 132 (2003) (False Claims Act "damages multiplier has compensatory traits along with the punitive."); *see also Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) ("Both RICO and the Clayton Act are designed to remedy economic injury by

providing for the recovery of treble damages, costs, and attorney's fees."). Seagate misplaces reliance on *Molzof* v. *United States*, 502 U.S. 301 (1992) (Opp. 14), a decision construing the United States' statutory immunity from liability "for punitive damages". Rejecting "a strict dichotomy between compensatory and punitive damages", *Molzof* held that "a plaintiff may be entitled to damages [from the United States] that are not legally considered 'punitive damages,' but which are for some reason above and beyond ordinary notions of compensation. . . ." *Id.*, at 306, 308.

Seagate misreads *Seymour* v. *McCormick*, 57 U.S. 480 (1853), as holding that the "purpose of enhanced damages under [a] statutory predecessor to Section 284 [in the Patent Act of 1836] is 'vindictive or punitive.'" Opp. 14. *Seymour*, which predates by 100 years the 1952 Act enacting § 284, "do[es] not hold that a finding of willfulness is necessary to support an award of enhanced damages." Pet. App. 37a (Gajarsa, J. and Newman, J., concurring, *citing*, at 36a, 40-42a, authority "explicitly recogniz[ing] a remedial aspect" to the statutory multiplier). Moreover, in the year before Justice Grier authored *Seymour*, he wrote in *Day* v. *Woodworth*, 54 U.S. 363 (1852), that the court's "power of increasing the 'actual damages'" for patent infringement applies when "the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff. . . ." *Id.*, at

372; *accord Clark* v. *Wooster*, 119 U.S. 322, 326 (1886) (same effect).[3]

Strict adherence to § 284's statutory text and respect for the discretion Congress conferred on district courts under § 284 commend review, and reversal, of the *en banc* decision. This pure question of statutory construction, which will arise and has already arisen in hosts of other patent infringement cases, makes immediate review imperative. *Cf. Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (deciding a question not pressed or passed upon below "at least to the extent of vacating the judgment below and remanding the case for consideration" of that issue).

III. WHETHER CHARACTERIZED AS SELECTIVE WAIVER OR DENIAL OF SUBJECT-MATTER WAIVER, THE *EN BANC* COURT HAS TURNED THE ATTORNEY-CLIENT PRIVILEGE INTO A WEAPON.

Nowhere does Seagate acknowledge the fact that its willfulness defense rests on legal opinions "received after suit was commenced. . . ." Pet. App. 23a. In such cases, opinion counsel assume an advocate's role that is not significantly different from the functions of trial counsel -- both are developing

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[3] Seagate incorrectly asserts that "Convolve now (for the first time) contends [that] willfulness is not *required* to recover enhanced damages under Section 284. . . ." Opp. 12 n.14. *But see* C.A. Opp. 52-54 ("Congress intended enhanced damages as an incentive to license"). Seagate also incorrectly asserts -- in conflict with *Safeco Insurance Co. of America* v. *Burr*, 127 S. Ct. 2201, 2208 (2007) (willfulness "cover[s] not only knowing violations of a standard, but reckless ones as well") -- that "'willful' requires reckless behavior." Opp. 5 n.8, 8 n.9.

defenses for use at trial and are "engaged in an adversarial process." *Id.*, at 20a; *see* ABA C.A. *Amicus* 16 ("With respect to post-litigation opinions, trial counsel will already assess and advise the accused infringer of the strength and weaknesses of its defenses. A post-litigation opinion, sought in addition to the advice of trial counsel, serves as little more than an attempted insurance policy against willfulness."); BADC C.A. *Amicus* 11 (acknowledging that "the distinction between opinion counsel and trial counsel may not be particularly significant" in post-litigation opinion cases). The *en banc* decision has the perverse effect of giving greater protection from discovery to infringers whose willfulness defenses rest on "marginal" post-litigation opinions than to those who seek counsel's advice in good faith before suit. Pet. App. 23a.

Seagate engages in semantic fallacy by first denying that the Federal Circuit laid down an "'absolute rule,'" then later acknowledging that the court "agreed that subject matter waiver stemming from the assertion of the advice of opinion counsel defense does not extend to trial counsel." Opp. 7, 23-24. Seagate's quarrel with petitioners' use of the term "selective waiver" rather than "denial of subject-matter waiver" is equally unpersuasive. *Id.*, at 9, 18-23. The Federal Circuit equates the terms when discussing waivers produced by advice-of-counsel defenses:

> . . . [S]elective waiver of the privilege may lead to the inequitable result that the waiving party could waive its privilege for favorable advice while asserting its privilege on unfavorable advice. . . . In such a case, the party uses the attorney-client privilege as both a sword and a

> shield. . . . To prevent such abuses, we recognize that when a party defends its actions by disclosing an attorney-client communication, it waives the attorney-client privilege as to all such communications regarding the same subject matter.

In re EchoStar Communs. Corp., 448 F.3d 1294, 1301 (Fed. Cir.), *cert. denied*, 127 S. Ct. 846 (2006) (*see* Pet. App. 14a, 19a); *accord Glenmede Trust Co.* v. *Thompson*, 56 F.3d 476, 486 (3d Cir. 1995) ("[A] party should not be permitted to define selectively the subject matter of the advice of counsel on which it relied in order to limit the scope of the waiver. . . .").

Semantics aside, Seagate acknowledges that its advice-of-counsel defense created a subject-matter waiver. Opp. 18-20, 22. "The widely applied standard for determining the scope of a waiver of attorney-client privilege is that the waiver applies to all other communications relating to the same subject matter." *Fort James Corp.* v. *Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005), *cert denied*, 547 U.S. 1069 (2006) (*cited* at Opp. 19).[4] The district court's scope-of-waiver was properly commensurate with Seagate's reliance on post-litigation legal advice in its defense. Pet. App. 63a-68a; *accord* BADC C.A. *Amicus* 10-12; FCBA C.A. *Amicus* 4. Although the Federal Circuit correctly stated that the appropriate

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[4] *Accord In re Keeper of the Records*, 348 F.3d 16, 24 (1st Cir. 2003); *PaineWebber Group, Inc.* v. *Zinsmeyer Trusts P'ship*, 187 F.3d 988, 992 (8th Cir. 1999); *United States* v. *Collis*, 128 F.3d 313, 320 (6th Cir. 1997); *In re von Bulow*, 828 F.2d 94, 102-103 (2d Cir. 1987); *United States* v. *Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982); *Weil* v. *Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981); *United States* v. *Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) (*en banc*).

standard of review was abuse-of-discretion (Pet. App. 9a), its opinion evaded this deferential standard by pronouncing a "new willfulness analysis" and using it to create a new privilege shielding trial counsel from subject-matter waivers. *Id.*, at 20a.[5]

Blanket trial-counsel exemption from subject-matter waivers risks judgments "predicated on incomplete, misleading, or even deliberately fabricated testimony." *Taylor* v. *Illinois*, 484 U.S. 400, 411-412 (1988) (recognizing "the broader public interest in a full and truthful disclosure of critical facts"). It creates a new trial-counsel privilege unique to patent cases, which conflicts with the other circuits' subject-matter and selective-waiver jurisprudence and with this Court's reluctance to "fashion a new privilege" that "'place[s] a potent weapon in the hands of [its proponents].'" *University of Pa.* v. *EEOC*, 493 U.S. 182, 189, 194 (1990) (citation omitted). Having successfully argued that the district court's scope-of-waiver orders "'raised an important issue of first impression'" warranting immediate mandamus review (Pet. App. 9a, citation omitted), Seagate's claim that the resulting "decision is not yet ripe for review" in this Court rings hollow. Opp. 18.

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[5] The crime-fraud/"chicanery" *exception* to attorney-client privilege, described by Seagate as an oasis of discretion left to district courts (Opp. 7, 21), is an entirely different doctrine than the advice-of-counsel defense subject-matter *waiver*. The privilege never attaches to communications "in furtherance of future illegal conduct" (*United States* v. *Zolin*, 491 U.S. 554, 556 (1989)), while waiver involves privileged communications put in issue by the privilege holder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 07-651

IN THE

Supreme Court of the United States

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.,

Petitioners,

v.

DAVID JENKINS AND CINDY JENKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 07-651

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.,

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v.

DAVID JENKINS AND CINDY JENKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

MOTION OF EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Amicus curiae Edison Electric Institute ("EEI") respectfully requests leave of this Court to file the following Brief in the above-captioned matter. In support of its motion, EEI states:

1. EEI requested the consent of both the Petitioner and Respondent to file its amicus brief. The Petitioner granted its consent in writing. Petitioner's written consent has been filed with the Court. Respondent stated in writing that it would

have consented to the filing of the amicus brief if the brief was filed timely, and the Respondent takes no position on whether the Court should grant EEI's motion for leave to file the brief. Respondent's letter has been filed with the Court.

2. Counsel for EEI just learned of the recently revised amicus curiae brief filing deadlines and notice requirement in Rule 37.2. In this case, by order dated November 28, 2007, the Court extended the time to file a response to the petition to January 16, 2008. EEI counsel wrongly assumed amicus curiae briefs also were due on January 16, 2008, as under the previously effective Court rules. However, under the text of revised Rule 37.2, it appears that the amicus brief was due December 28, 2007, or 30 days after a response is called for by the Court. Rule 37.2 also requires an amicus curiae to notify all parties of its intention to file an amicus curiae brief at least 10 days prior to the due date for such brief.

3. The Clerk's comment on Rule 37.2 states that the purpose of the earlier filing deadline revision is to allow the respondent time to respond to an amicus curiae brief in the same document and at the same time as it responds to the petition for writ of certiorari. EEI respectfully submits that this purpose is met in this case, as Respondent will have 12 days to consider and respond to EEI's amicus curiae brief.

4. EEI is the national association of U.S. shareholder-owned electric utilities, their affiliates and industry associates worldwide. Its U.S. members serve 95% of the ultimate customers in the shareholder owned segment of the industry and represent approximately 70% of the U.S. electric power industry. They own about sixty percent of transmission system facilities in the country. EEI

members are extensively regulated at both the federal and state levels. EEI's members have a strong interest in assuring the exclusive authority of the Federal Energy Regulatory Commission ("FERC") in regulating rates, terms and conditions affecting wholesale sales and transmission of electricity in interstate commerce, and for this reason EEI has participated before this Court in a long line of cases that have consistently sustained FERC authority against collateral challenges in state forums. *Entergy Louisiana, Inc.* v. *La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003) ("*ELI*"), *New York v. FERC*, 535 U.S. 1 (2002) ("*New York*"), *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*"), *Nantahala Power & Light* v. *Thornburg*, 476 U.S. 953 (1986) ("*Nantahala*").

5. EEI submits that the potential implications of the Texas court decision are of immense national importance. EEI believes that its familiarity with the national electric industry and FERC's regulation thereof will aid this Court's understanding of the issues presented in this case. EEI's brief focuses on the extent to which the Nation's interstate electric grid is operated by regional system operators under FERC-approved tariffs analogous to that at issue in this case and how the likely attempted application of the Texas court ruling by juries applying the common law of torts has the potential to disrupt FERC's exclusive authority to manage this nation's wholesale electric markets if the Texas decision is allowed to stand. *See infra*, Brief of Amicus Curiae Edison Electric Institute, at 6-13.

Respectfully submitted,

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January 4, 2008

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QUESTION PRESENTED

The question stated in the petition for a writ of certiorari is: "Whether, under *Entergy Louisiana, Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), a state court may determine that the bulk power supply arrangements of an interstate power pool governed by a FERC tariff violate state tort law and may award retail customers damages based on what their electricity rates would have been if the interstate power pool operated in the manner that the state court jury finds prudent?"

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INTEREST OF AMICUS CURIAE[1]

The interest of amicus curiae is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Texas court decision intrudes on the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") in violation of the Federal Power Act and the Supremacy Clause. The concern of the Edison Electric Institute ("EEI") is that the Texas court decision raises serious implications for uniform regulation of the national electric markets and the continued effective functioning of regional organized markets. *See infra* at 6-13. Under the rationale of the Texas court, retail ratepayers may bring class actions challenging "discretionary" aspects of decisions affecting wholesale rates that result from an array of arrangements common in the industry, including regional transmission organizations and market-based rate auctions. Under sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d & 824e, any

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. As discussed in the motion accompanying this brief, EEI counsel has notified all counsel of record of its intention to file this brief, but was not aware of the revised Rule 37.2 notice requirement until the time for complying with such requirement had passed. The Petitioner has consented to the filing of this brief. Respondent stated in writing that it would have consented to the filing of the amicus brief if the brief was filed timely, and the Respondent takes no position on whether the Court should grant EEI's motion for leave to file the brief.

complaints about wholesale power rates must be resolved by FERC—the neutral body established by Congress—under the Federal Power Act, not by juries prone to exercising parochial interests under common law. If allowed to stand, the Texas court decision will impair FERC's ability to regulate multistate holding company systems, organizations operating regional markets, and wholesale power auctions.

EEI believes that the Texas decision so clearly runs afoul of the prior decisions of this Court that a grant of certiorari is warranted.

STATEMENT OF THE CASE

EEI adopts the Statement of the Case in Entergy's petition for a writ of certiorari ("Petition").

REASONS FOR GRANTING THE PETITION

EEI supports fully the in-depth legal analysis in the Petition. In EEI's judgment, the Petition accurately and persuasively states controlling law which warrants a grant of certiorari. In addition, EEI submits that the potential implications of the Texas court decision are of immense national importance. Granting the Petition for a Writ of Certiorari is required in order to avoid potential disruptions to this nation's organized electric markets, and FERC's exclusive regulation of activities affecting such organized markets, resulting from independent state common law court decisions that may result if the Texas court decision is allowed to stand.

1. Supreme Court Precedent Bars the Texas Court Decision. The Court's decisions in *Entergy Louisiana, Inc.* v. *Louisiana Public Service Commission*, 539 U.S. 39 (2003) ("*ELI*") and

Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*") both addressed the very System Agreement at issue here. Those decisions squarely apply to the issues presented in this case and foreclose the Texas state court ruling. The Texas state court decision presents a compelling case for this Court to grant the petition to protect the integrity of FERC's exclusive jurisdiction over wholesale markets, rates and cost allocations and to ensure the proper functioning of national electric markets.

The case for granting the petition perhaps is even stronger here than in those prior cases, because the prior cases involved state public utility review of matters committed exclusively to FERC while the Texas decision would allow lay juries to review those matters. The prospect of substantially varying state-by-state jury evaluations of the "prudence" of wholesale energy cost allocation and purchasing decisions by a multistate system operator strikes at the core of FERC's exclusive jurisdiction and the Federal Power Act. The Act gives FERC alone "plenary" jurisdiction to regulate all aspects of wholesale transactions, regardless of their "impact" on state regulation, and thus draws a "bright line easily ascertained" that divides federal and state authority. *FPC* v. *S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). As this Court has repeatedly held, FERC's jurisdiction is "exclusive" and "applies not only to rates but also to power allocations that affect wholesale rates." *MP&L*, 487 U.S. at 371. The "filed rate doctrine" requires states to give effect to wholesale rates and power allocations contained in FERC tariffs unless and until they are disapproved by FERC and was developed to "enforce the exclusive jurisdiction vested by Congress in FERC." *Nantahala*

Power & Light Co. v. *Thornburg*, 476 U.S. 953, 966 (1986) ("*Nantahala*").

Contrary to this consistent precedent, the Texas court held that juries may nullify FERC-jurisdictional cost allocations and purchasing decisions in tort actions when it is alleged that the allocations and decisions are the product of discretionary decisions of the operators of interstate power pools. Petition, App. 30a-32a. If allowed to stand, this holding would permit lay juries to review practices contemplated in FERC-approved tariffs affecting FERC-approved rates and cost allocations and to prevent the recovery of wholesale costs that FERC tariffs mandate be allocated to retail ratepayers in particular states. There is no question that this holding is barred by *ELI* and *MP&L*. The primary basis upon which the Texas court rests its decision—that a state court may review *discretionary* FERC-jurisdictional procurement decisions—was addressed head on in *ELI*. The Court found that it made no difference to its preemption analysis that the FERC tariff in question (the same System Agreement at issue here) delegated discretion to make such decisions to a particular group rather than prescribing the precise rate. *ELI*, 539 U.S. at 49-50. As the Court clearly found in *ELI*:

> It matters not whether FERC has spoken to the precise classification of ERS units, but only whether the FERC tariff dictates how and by whom the classification should be made. The amended system agreement clearly does so, and therefore the LPSC's second-guessing of the classification . . . is pre-empted.

ELI, 539 U.S. at 50. That precise analysis applies when such decisions are subjected to review by lay juries as opposed to state utility commissions as

Entergy explains compellingly in its Petition. Petition at 17-18.

Beyond its general reliance on the decisions being discretionary, the Texas court attempts to carve exceptions to FERC jurisdiction that do not exist under controlling law. First, the Texas court offers that a state court may consider, on a case-by-case basis, whether state review of the discretionary decisions would "impact or impair FERC's flexibility." Petition, App. 30a. This Court has "long rejected this sort of 'case-by-case analysis of the impact of state regulation upon the national interest.'" *MP&L*, 487 U.S. at 374 (quoting *Nantahala*, 476 U.S. at 966 (quoting *S. Cal. Edison*, 376 U.S. at 215-16)). *ELI* held that *all* charges imposed pursuant to FERC-approved tariffs, whether fixed or not, should be treated the same, for a different rule "would substantially limit FERC's flexibility in approving cost allocation arrangements." *ELI*, 539 U.S. at 50.

Second, the Texas court justifies the intrusion on FERC's exclusive jurisdiction because the operating company purportedly has "broad" discretion over bulk power supply arrangements under the System Agreement and there is no "mandate that FERC oversee" these discretionary bulk power supply decisions. Petition, App. 34a. However, this Court has created no gradation of discretion for purposes of determining whether a matter is within FERC's exclusive jurisdiction. Under the prior decisions of this Court, FERC is the sole forum for resolving challenges to discretionary power supply and procurement decisions under the System Agreement. *ELI*, 539 U.S. at 49-50; *MP&L*, 487 U.S. at 371; *Nantahala*, 476 U.S. at 966. Thus, the analysis starts and stops at the determination of whether the issues affect the reasonableness of wholesale rates.

Here, without question, the FERC tariff at issue—the System Agreement—prescribes standards that govern the power supply and procurement decisions challenged by Respondents.

The Texas court also erroneously relied on the ground that FERC has elsewhere stated that "wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options." Petition, App. 31a (quoting *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,975 (1998)). FERC and the courts have repeatedly held that FERC's reasoning in *Central Vermont* has no application where, as here, the purchaser is a member of an interstate power pool and the FERC rate schedule mandated that it incur the wholesale power costs at issue. *MP&L*, 487 U.S. at 373-74; *ELI*, 539 U.S. at 49-50; *Nantahala*, 476 U.S. at 972; *MP&L*, 487 U.S. at 378 (Scalia, J., concurring); *AEP Generating Co.*, 36 FERC ¶ 61,226 at 61,550-51 (1986). Even if a state can review the prudence of a buyer's power purchases when the buyer could legally have chosen to obtain power from other sources at other rates, Entergy Gulf States Inc. and the other System Operating Companies have no such choice here. *See MP&L*, 487 U.S. at 373-74.

2. The Texas Court Decision Has Broad Implications Potentially Affecting Regional Electricity Markets Throughout the Nation. The implications of the Texas court decision to undermine FERC jurisdiction potentially extend far beyond the System Agreement involving the Entergy system. The Texas court's holding potentially creates broad new exceptions to FERC's exclusive jurisdiction that litigants may seek to apply to any regional system operator. In recent years, FERC has approved a variety of regional wholesale electric power sales

and marketing arrangements where system operators are vested with decision-making authority that affects wholesale rates and cost allocations. Multistate power pooling arrangements are commonplace in the electric industry.

In response to FERC initiatives, the industry has moved to regional management of interstate transmission grid and wholesale power markets through Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs"). *See, e.g., Reg'l Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). These are groups of non-affiliated utilities whose transmission facilities, and often generation facilities, are under the common control of a system operator. *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061 (2001).

Currently, regional system operators manage the operation of the wholesale electric network affecting a majority of states in the Nation.[2] The New England RTO serves the 6 New England states. The New York ISO serves New York. The PJM RTO serves not only Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia, but in recent years has been extended to serve all or parts of nine additional states (Virginia, West Virginia, North Carolina, Ohio,

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[2] A recently-updated map available on FERC's website shows the Nation's RTOs. FERC: RTO/ISO, http://www.ferc.gov/industries/electric/indus-act/rto.asp (last updated Dec. 17, 2007).

Illinois, Indiana, Kentucky, Tennessee, Michigan). The Midwest, or MISO, RTO serves all or portions of 13 states (Pennsylvania, Ohio, Michigan, Indiana, Illinois, Missouri, Kentucky, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota and Montana). The Southwest Power Pool, or SPP, RTO serves all or portions of seven states (Kansas, Oklahoma, Missouri, Arkansas, Louisiana, Texas and New Mexico). And the California ISO serves utilities in California, but has the potential to affect wholesale electric rates and practices for all states West of the Rocky Mountains (*i.e.*, Washington, Oregon, Idaho, Montana, Wyoming, Nevada, Colorado, Utah, New Mexico and Arizona).

For each of these regional organizations, FERC has approved complex tariffs that set forth rules, processes and procedures that must be followed in order to establish regional markets for wholesale electric transactions and to control multistate transmission operations. *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061 (2001). The agreements to form and operate these regional system organizations require EEI members in different States to bear significant costs. If individual states could prevent individual utilities from recovering some or all of the costs assigned to or incurred by them under these FERC jurisdictional agreements, EEI members could face significant financial hardship and FERC's efforts to promote regional electricity markets could be thwarted.

In numerous instances, the FERC-approved tariffs give broad decision-making authority to a system or regional operator without spelling out every detail in the tariff how such decisions should be made. This is essential given the complexity of the interstate

electric network and the need to ensure that generation can reliably serve customer needs on a minute-to-minute basis. *New York v. FERC*, 535 U.S. 1, 15-17 (2002) (upholding FERC's jurisdiction and noting the technological complexities of the national grids).

Despite the complexity of regional system operations and the detailed FERC tariffs and rules, terms and conditions affecting their operation, under the Texas court holding, retail customers or their representatives could seek to nullify these FERC-approved arrangements and decisions to recover alleged overcharges as tort damages by bringing state-law actions claiming that the resulting wholesale rates or cost allocations are excessive due to arrangements and decisions FERC has chosen to leave under the FERC-approved tariff to the system operator or other wholesale utilities.

If allowed to stand, litigants could rely on the Texas state court holding to support a class action suit and/or jury trial in state court against any regional system operator or system member that makes decisions pursuant to FERC-approved tariffs and/or agreements. Regional system enabling agreements and tariffs, like the Entergy System Agreement, often do not mandate every detail of specific decisions, but rather vest system operators with authority to make such decisions.

Many regional system operators control both the dispatch and transmission of electric energy. A plaintiff representing a group of customers in a transmission-constrained area in such a region could point to a number of decisions made by the regional system operator pursuant to FERC-delegated authority that have the effect of increasing the delivered price of power to the customers. However,

any decision that had the effect of raising the price of power in one portion of a region may well keep the price of power lower in another portion of the region. Thus, if the decision were made in a different manner that had the effect of lowering prices in one region and raising them in another region, other customers might find the alternative decision was "imprudent" under the rationale of the Texas court and ask a lay jury to review such decision.

In virtually any regional system, the energy pricing formula is FERC-approved, and the operation of the system must comply with numerous and complex operational and reliability requirements. While FERC approves the relevant electric system rules, at some point implementation of the energy pricing formula and rules rests on an underlying representation of the transmission capability of the system that is developed using a number of engineering and operational decisions not explicitly set forth in a FERC approved tariff or reliability rule. This would include key inputs such as transmission line transfer capabilities (*i.e.*, how much power a line can transmit at a given time), a technical concept that varies with use of the networked transmission grid, temperature and other factors. A conservative set of decisions affecting transfer capability to assure reliability could result in higher energy prices in transmission-constrained areas. There are dozens of similar types of decisions that a regional system operator makes on a regular basis that are not mandated explicitly by the tariff but delegated to the system operator by FERC.

Decisions about the transfer capability of the transmission system are involved when a regional system operator determines how many Financial Transmission Rights ("FTRs") can be made available

to the market. Under FERC-approved tariff rules, FTRs are financial instruments that entitle the holder to a stream of revenues (or charges) based on the hourly energy-price differences across the transmission path. The availability of FTRs for hedging will directly affect the delivered price of power to a transmission-constrained region. A plaintiff could allege that the regional operator was unreasonably restricting the availability of FTRs through its decisions in developing the model that determines the quantity of FTRs that can be issued.[3]

Yet another area in which a regional system operator has decisional judgment under a FERC-approved tariff (in its role as a transmission system operator) is in scheduling of transmission outages. If a regional system operator were to approve a line outage and then some event occurred during the outage and the combined effect was to make locational energy prices rise, under the Texas court's rationale, a plaintiff could bring a suit in state court alleging negligence in state court and claim that the regional system operator could have reasonably foreseen the problem and should have scheduled the outage at a different time.

In short, under the Texas court holding, a plaintiff could challenge any of a large number of a regional system's complex underlying operational decisions and the energy prices that result from them, so that a state court jury would, in effect, second guess the regional system operator's decisions and the resulting

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[3] Resources discussing FTRs are available on PJM's website, www.pjm.com, including a document containing frequently-asked questions regarding FTRs. *See* FTR Market, Frequently Asked Questions, http://www.pjm.com/markets/ftr/downloads/ftr-faqs.pdf (last updated Feb. 1, 2005).

energy prices. In each of the above examples, the Texas court holding, if allowed to stand, could be relied on to support the legal theory that a state jury may determine whether retail customers paid excessive electricity prices as a result of such decisions of the regional system operator, because the operational decision, while committed to the regional system operator under a FERC approved tariff, was not explicitly mandated. This is precisely the second guessing the Court held was preempted in *ELI*.[4] Whether it is a multistate holding company acting as a system operator under a FERC-jurisdictional system agreement, or an organization acting as a system operator under a FERC-jurisdictional tariff and Operating Agreement, the Texas Court of Appeals decision, if not overturned, would open the door to countless state court juries reviewing critical decisions made pursuant to FERC-jurisdictional tariffs.[5] The Federal Power Act, as found by this

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[4] As explained in the Petition, FERC has also established alternative "market-based" mechanisms for providing electricity at wholesale, including the use of formal auctions to procure power. Because the FERC-approved market-based tariffs and regulations do not prescribe the price of energy or every detail of an auction, litigants may attempt to rely on the Texas decision to challenge auction results in state court. An Illinois federal district court recently denied such a state law class action in which retail ratepayers claimed that rates resulting from an auction under authorization set forth in FERC market-based tariffs were excessive and sought to collect the amount of the alleged overcharges as tort damages. *Schafer ex rel. Wexler* v. *Exelon Corp.*, Nos. 1:07-CV02316 & 1:07-CV-2318, 2007 WL 4557815, (N.D. Ill. Dec. 21, 2007).

[5] The exclusivity of FERC's jurisdiction and FERC's plenary authority is the same regardless of whether the decision involves wholesale energy transactions, rates, cost allocations or decisions affecting transmission availability. *ELI*, 539 U.S. at 49-50, *New York*, 535 U.S. at 23-24.

Court, requires that FERC be the sole forum for determining the reasonableness of wholesale electric rates and cost allocations. Given the critical importance of the issues at hand to the functioning of the national electric industry and FERC's role as the neutral body regulating the wholesale power industry, EEI urges the Court to grant the Petition.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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